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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DIALAMERICA MARKETING, INC.,

Petitioner,

—against—

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Are all homeworkers statutory employees subject to the requirements of the Fair Labor Standards Act (the "FLSA") even though no control is exercised over their performance of services, they are not economically dependent on the particular home work for their livelihood, they have the option of becoming in-house employees performing more diverse services or taking on home work from other businesses, and the work they perform is on the periphery, and is not in any respect integral to, the business of the putative employer?

2. In determining that persons providing research services to Petitioner off its premises were employees of Petitioner under the FLSA, did the Third Circuit err in holding that: (1) the absence of control or supervision by Petitioner over the manner and performance of the services rendered by the home researchers was not significant under this Court's test for determining who is an "employee" for FLSA purposes; (2) the researchers were "dependent" upon Petitioner even though the undisputed evidence demonstrated that the researchers did not want full or part time in-house regular employment and did not rely upon the income earned from Petitioner for their support; and (3) the work performed by the researchers constituted an "integral part" of Petitioner's business even though the researchers worked in only one area of Petitioner's business, worked only on the least profitable and sensitive aspect of that area, located only 3-5 percent of the information Petitioner sought, and had no impact on Petitioner's profitability or operations.

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IN THE

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DIALAMERICA MARKETING, INC.,

*Petitioner,**

—against—

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,

*Respondent.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner DialAmerica Marketing, Inc. ("DialAmerica") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 13, 1985, as amended April 18, 1985 after rehearing and rehearing in banc were denied on April 9, 1985.

Opinions Below

The letter opinion and order of the United States District Court for the District of New Jersey is not reported and is printed in the Appendix hereto at 27a-39a. The opinion of the United States Court of Appeals for the Third Circuit is reported at 757 F.2d 1376 (3rd Cir. 1985) and is printed in the Appendix hereto at 1a-26a.

*Pursuant to Rules 21.1(b) and 28.1, DialAmerica Marketing, Inc., a non-public company, discloses an affiliation by way of partial common ownership with Dial Adjustment Bureau, Inc., another privately held corporation. Pursuant to Rule 43(c), F.R.A.P., William E. Brock, Secretary of Labor, has been substituted for Raymond J. Donovan, who has resigned as Secretary of Labor.

Jurisdiction

The opinion and judgment of the Third Circuit was decided and entered March 13, 1985. A timely petition for rehearing and rehearing in banc was denied April 9, 1985. On April 18, 1985, the Third Circuit issued an order amending its decision of March 13, 1985, and on April 27, 1985, it issued an order staying the issuance of the certified judgment in lieu of formal mandate until July 8, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statute Involved

The statutory provisions involved are from the Fair Labor Standards Act of 1938, 29 U.S.C. §§201 *et seq.*, as amended:

> 29 U.S.C. §203(d): " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ."
> 29 U.S.C. §203(e)(1): ". . . 'employee' means any individual employed by an employer."
> 29 U.S.C. §203(g): " 'Employ' includes to suffer or permit to work."

Statement of the Case

The United States Department of Labor (the "Department") commenced this action in December 1981, alleging that DialAmerica willfully violated the minimum wage and recordkeeping provisions of the FLSA in connection with a home telephone research program. Specifically, the Department charged that home telephone researchers who performed services for DialAmerica at home and with no supervision, as well as certain distributors who brought research cards to other home researchers recruited and paid by such distributors, were "employees" under the FLSA and that DialAmerica willfully violated the statute by failing to

pay the home researchers and distributors an hourly minimum wage. (A 4-6.)* The Department sought both injunctive relief and several hundred thousand dollars in alleged back wages and interest.

On September 22, 1982, the District Court (Stern, J.) decided at a status conference that the parties should prepare a joint stipulation of facts and a joint statement of issues in dispute prior to engaging in an evidentiary hearing concerning the issue of whether the home researchers and distributors were employees of DialAmerica, or rather independent contractors not subject to the FLSA. (A 310.) The question of damages, if any, was reserved for future proceedings if necessary.

An evidentiary hearing took place on July 13 and 14, 1983. (A 34-253.) On November 4, 1983, DialAmerica and the Department cross-moved for an order of summary judgment on the issue of whether the home researchers and distributors were employees under the FLSA. (A 254-55.) On January 26, 1984, the district court issued its letter opinion and order awarding summary judgment to DialAmerica and dismissing the Department's complaint. That opinion is printed in the Appendix hereto at 27a-39a.

On the Department's appeal, the Third Circuit decided to treat the District Court's letter opinion as the findings of fact and conclusions of law required by Fed. R. Civ. P. 52 and its order as a judgment entered after trial pursuant to Fed. R. Civ. P. 58. 757 F.2d at 1381-82, Appendix at 8a. On March 13, 1985 the Third Circuit entered its opinion and judgment which affirmed in part, holding that the distributors were not employees of DialAmerica with respect to their distribution activities, and reversed in part, holding that all of the home researchers, including the distributors and those to whom they distributed research cards, were employees of DialAmerica with respect to their re-

*All "A____" references are to the Joint Appendix filed in the United States Court of Appeals for the Third Circuit.

search function. That opinion is reported at 757 F.2d at 1376-1390, and is printed in the Appendix hereto at 1a-26a. DialAmerica's timely petition for rehearing and rehearing in banc was denied on April 9, 1985. Appendix at 40a.

The facts which were stipulated to by the parties or adduced from the undisputed testimony at the evidentiary hearing are as follows:

1. The home research program was not a significant or integral part of DialAmerica's business.

DialAmerica maintains its principal place of business in Teaneck, New Jersey, has offices in 19 other states and employs over 2,400 persons nationwide. (A 18-19.) DialAmerica is in the telephone marketing business principally selling magazine subscriptions through two major sales programs. One is the sponsor program whereby DialAmerica's in-house employees call people out of telephone books trying to sell magazine subscriptions with the promise that DialAmerica will donate a portion of the proceeds to a youth activities group. The home researchers were not involved in this program. (A 19.)

The other major program is an expire program whereby publishers supply DialAmerica with names of individuals whose magazine subscriptions are about to or have run out, and DialAmerica attempts to telephone these persons to sell them renewal subscriptions. DialAmerica prints cards with the names and addresses supplied by the publishers, and there is a place on the cards for the subscriber's telephone number to be inserted. Before these cards go to its branch sales offices, DialAmerica must locate the subscriber's telephone number and have it inserted on the card. The home telephone researchers were involved in this program (A 19-20), but they comprised only a marginal part of DialAmerica's operations.

Indeed, since June 1979, out of the total number of cards for

which DialAmerica has attempted to find phone numbers approximately 50 percent of them have been located by way of a computer match search, which costs DialAmerica less than 1 cent per number found. Approximately another 20 percent have been located by way of a telephone directory search conducted by in-house employees. (A 20-21.) DialAmerica is unable to locate by any means approximately 25 percent of the numbers sought.

Thus, only approximately 3-5 percent of the total number of numbers sought were located by home researchers. (A 230, 234.) Further because of the inherent limited nature of their services, home researchers were not even permitted to research many card categories. Priority cards requiring a fast turnaround and cards containing sensitive information were not given to home researchers because DialAmerica could not supervise them. (A 20, 229-30, 243-45.) These categories of cards represented DialAmerica's best, most profitable cards, and they were never placed for researching within the home researcher program. (A 229.)

Indeed, the home researcher program was set up by DialAmerica in 1976 only as a stop-gap measure until it established a computer research program. (A 21, 234.) After the computer system was installed in 1979, DialAmerica never really examined whether it was worthwhile to maintain the home researcher program, and the program continued of its own accord without DialAmerica being burdened by any of the supervision it applied to its in-house operations. (A 234.)

It therefore was not surprising that the discontinuance of the home researcher program by DialAmerica in June 1982 (as a result of the Department's action) had no impact on the profitability of DialAmerica's operations or on its sales volume. Nor did the discontinuance of the program have an effect on the volume of numbers that were ultimately found and given to DialAmerica's sales personnel. In fiscal 1983 (beginning July 1, 1982 and ending June 30, 1983), in fact, DialAmerica recorded its best sales year ever. (A 231-32.)

2. DialAmerica maintained a closely supervised environment for its in-house employees.

The persons working in DialAmerica's in-house lead processing department, who are paid a minimum hourly wage, work in a closely supervised environment. DialAmerica conducts three shifts of approximately 40 part-time employees per shift. These employees must report to DialAmerica every work day and are obligated to punch a time clock and work regular hours. Unlike the home researchers, they cannot take days or weeks off at will. Their work is supervised by DialAmerica personnel, and they must search a minimum 70 phone number cards per hour and are dismissed if they fail to maintain the quota. The employees also must spend 10 percent of their time on clerical work and have standard deductions taken from their paychecks. (A 20-21, 48-53, 217-18, 229, 237-38.)

3. DialAmerica did not control in any manner the home researchers' performance of services.

DialAmerica initially recruited home researchers through 5 advertisements in a local shopper newspaper, but since May 1979 all home researchers sought out DialAmerica for the opportunity to do the work after hearing about it from friends or family members. These persons made an appointment to speak to someone in DialAmerica's lead processing department. At that time they learned how to fill out a magazine expire card, and they signed an independent contractor agreement. (A 21-22, 218.)

In contrast to its in-house employees, DialAmerica did not supervise in any manner how, when or where the home researchers searched the telephone cards. After completing an initial box of 500 cards with numbers to research, a home researcher could ask for as many cards as he or she wanted to research (subject to a 500 card minimum and availability). Experienced researchers would pick up as many as 3,000-5,000 cards per week. Appointments were set up for the cards to be returned, but if re-

searchers needed more time they simply made new appointments.* Moreover, DialAmerica never rejected anyone who wanted to be a home researcher. (A 21-22, 23-25, 39-40, 52, 69-70, 74, 108, 123, 135, 150.)

DialAmerica, of course, did not have a supervisor in the researchers' homes when the work was performed. Home researchers determined on their own the time of day and/or night that they would do the research. They could take as long as they wanted to complete the cards, as there were no minimum or maximum number of hours required by DialAmerica. The home researchers were not required to maintain a handbook recording the number of hours they worked. Other than the magazine expire cards themselves, DialAmerica did not provide any equipment for the home researchers or reimburse them for their expenses. The home researchers were not assigned territories, and—unlike in-house employees—could reject particular cards for any reason or request cards containing addresses from particular states. (A 24, 26, 51, 53, 60-61, 70, 82-83, 123, 186, 193, 209-10, 218-20, 236-37.)

The home researchers at their discretion could cease taking boxes of cards for intervals of time, such as vacations, whenever and for how long they chose, after which time they could resume as a home researcher. They were under no obligation to complete the cards they took and could terminate their relationship with DialAmerica on their own accord at any time. (A 25, 51-52, 60, 123, 186, 193, 210, 218-19.)**

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*The reason appointments were made is that many of the researchers were women with small children and DialAmerica tried to avoid having a large group show up unexpectedly with lots of children running around the office while the cards were being picked up or delivered. (A 23-24).

**The stark difference between the work conditions for the home researchers and the in-house employees is illustrated through the testimony of two home researchers who also worked in-house. Their testimony established that while working in-house, they were obligated to appear, fol-

(Footnote continued on following page)

Furthermore, the home researchers were also free at all times to accept work or employment with other businesses, as some did. Home telephone number research and other homework was available in the Northern New Jersey area from companies other than DialAmerica on an independent contractor basis. (A 44, 47, 77-78, 146, 150-51, 170, 187, 208, 222, 236.) Moreover, the home researchers at all times had the option to work as in-house employees at DialAmerica, performing more diverse and detailed activities under close supervision, if they wanted. (A 222.)

DialAmerica became involved in the home researchers' work only when a researcher returned numerous cards with incorrect numbers. In such instances, DialAmerica would pay the researcher for his or her reported rate of numbers found, and then refuse to provide additional cards. (A 220, 237.) This kind of quality control, however, is endemic to any work relation, whether the person is an employee or an independent contractor. (A 80-81.)

4. The home researchers' rate of compensation.

Home researchers were compensated on a piece rate basis. The initial rate of 5 cents per number found was set by DialAmerica and recorded in the Independent Contractor Agreements signed by the home researchers. That amount, which represented approximately DialAmerica's in-house cost per telephone number found, went up to 7 cents, and then to 10 cents per number found, when DialAmerica was informed by the researchers that they were having difficulty finding numbers. On special projects DialAmerica adjusted the piece rate higher in order to compensate the home researchers for lower percentage

(Footnote continued from previous page)

low instructions and work under supervision. In contrast, while working as home researchers, they felt no obligation to DialAmerica—as opposed to themselves—to do the work at all, much less on a regular, controlled basis. (A 50-54, 60-61, 192-93.)

of telephone numbers found. (A 22, 166, 235-36.) The home researchers were able to increase their opportunities for making money by investing in and installing telephones with speed and computerized dialing or obtaining other states' telephone books, and by choosing to work particular hours, often late at night, when both directory assistance was more forthcoming and the researchers' children were asleep. (A 42, 82-83, 112, 146, 168, 183, 196, 203.)

DialAmerica paid the home researchers with whom it dealt directly by check. No deductions were taken from the checks. DialAmerica provided researchers who earned $600 or more with a Form 1099 reporting the researchers' gross compensation. (A 22-23.) The home researchers were not reimbursed by DialAmerica for their expenses (A 71, 236), and they took such expenses as tax deductions, including such items as travel, car depreciation, home office, supplies, telephone books. (A 95, 100, 109, 111, 133, 149, 151, 184, 190.) Home researchers also filed Social Security self-employment tax forms (A 149, 176, 184, 198, 202, 207), and listed their income as self-employed business income on their tax filings. (A 78, 148, 168, 176, 190.) Home researchers received no employee benefits such as health or other insurance. (A 235.) No claim for unemployment insurance was filed by a home researcher. (A 82, 235.)

5. Home researchers were not economically dependent upon DialAmerica.

The home researchers, who were primarily housewives with small children, did the work simply to earn some extra household money. No home researcher depended on the program as the prime source of family income. (A 58, 64, 71, 79, 179.) Indeed, they were free, if they chose, to apply to DialAmerica to be an in-house employee (A 222), just as they were free to perform in-home research for other organizations (A 236), but the home researchers as a group, with some exceptions, declined to pursue these opportunities. Rather, the home researchers found the work

attractive because of the complete freedom they had to fix how and when to research the telephone cards. As one researcher, Mr. Rea, testified, "I work for myself, right." (A 205.) Ms. Rizzo, another home researcher, testified, "It is your own system and how you worked. . . . It was fun as well as work." (A 209.)

The home researchers as a group found that it paid better to work at home on a piece rate basis rather than take on in-house employment at DialAmerica at a fixed hourly wage. Moreover, the home researchers considered the program to be simply a practical means of earning extra pocket money. (A 79, 151, 169-70.)

6. The distributors operated their own independent businesses.

Six or seven of the home researchers also acted as distributors and picked up cards for other persons. The distributors were not subject to any supervision from DialAmerica in running their distributor operations. The distributors recruited their own distributees (usually friends or relatives). One distributor advertised for researchers to do work for him. (A 88-89, 102, 174.) No distributee was ever rejected by DialAmerica as a researcher, and in the last years of the program DialAmerica did not even require applications to be submitted for the distributees and did not keep any records concerning the distributees. (A 22, 108, 143, 161, 168, 173, 178.)

DialAmerica paid the distributors one cent per found number above the then current piece rate for each number found by their distributees. (A 23.) The distributors received only one gross check from DialAmerica, however. The distributors set their own rates with their individual distributees and determined on their own how much to pay them, which could be less than the piece rate paid by DialAmerica directly to home researchers; thus, for example, when the piece rate was 10 cents, DialAmerica paid distributors 11 cents per number found and some distributors then paid their distributees 8 cents per card, keeping 3 cents per card for themselves. (See A 92, 107, 166, 175.)

DialAmerica never checked to see how much distributors were paying and did not in any other manner insinuate itself in the distributors' business. (A 93-94, 107, 112, 236.) The distributors kept their own records, which were not required or inspected by DialAmerica, to determine how much to pay the distributees and to prepare tax returns. (A 101, 114, 136, 162-64, 177, 236.) The distributors issued tax 1099 forms directly to their distributees. On their own tax returns, the distributors took various deductions and reported their income taxes as self-employed businessmen, not as employees of DialAmerica. They took deductions for commissions paid to distributees, travel expenses, car depreciation, allocations for home office, and office supplies. (A 95-96, 100, 109-11, 121, 133, 149-50, 152, 168.) The deductions were so pervasive that at least one distributor reported a loss on her income taxes. (A 150.)

7. Termination of the home researcher program.

DialAmerica discontinued the home researcher program in June 1982 as a consequence of the Department's enforcement action. At that date DialAmerica—which had last advertised for home researchers in May 1979 (A 21)—had a list of persons who had contacted the company, unsolicited, to request the opportunity to do home research work. (A 222.)

Reasons for Granting the Writ

This Court should grant certiorari because the Third Circuit misconstrued the test established by this Court for determining the status of workers under the FLSA. The Third Circuit all but read the factor of control over a worker's performance out of this Court's long standing test and imposed, in effect, a *per se* rule that homeworkers are always statutory "employees". In so ruling, the Third Circuit ignored the economic reality of the home researcher program and its relationship to DialAmerica's operations, in contravention of this Court's test.

Indeed, the Third Circuit has broadened the already wide scope of the FLSA by eliminating and/or misconstruing principal elements of this Court's test. The Third Circuit has thereby given the Department a mandate—not otherwise available under this Court's test—to regulate work relationships which do not involve the abuses sought to be remedied by the FLSA and which do not require governmental interference to correct deficiencies that, in fact, do not exist.

Thus, virtually all the homeworker cases in which workers have been held to be FLSA employees involved wholesale attempts by a company to evade the statute's minimum wage requirements. In those cases, the homeworker operations comprised practically the entire—if, indeed, not the entire—work force without which the company would cease to function. Thus, the homeworkers there most plainly were an integral part of the company's business. Further, the homeworkers in most instances appear to have been full-time workers and had no option to be an in-house employee, earning a fixed minimum wage while working in a closely supervised environment and performing more detailed and diverse tasks, for the fundamental reason that no such in-house operations existed. Thus, those workers most plainly were economically dependent on the company's "home operations" for their livelihood.

The record evidence established that those factors were absent from DialAmerica's home researcher program. That program was only a peripheral part of DialAmerica's business, with no more than 5 percent of the total numbers found for one sales program having been located by home researchers and, indeed, with no effect whatsoever on the profitability of its operations caused by the termination of the program. Furthermore, DialAmerica at all times offered the home researchers the option of working as in-house employees for a fixed hourly wage and thereby becoming involved in other, more essential aspects of DialAmerica's research under close supervision, if they desired—a factor which we submit may be dispositive but which the Third

Circuit wholly ignored. The home researchers also had the option of working at home for other businesses, as some did.

As a group, however, the home researchers—including those who had also worked as in-house employees for DialAmerica—preferred to work as home researchers because of the freedom it gave them in setting their work hours and taking weeks off at a time, and also because it was a convenient manner for the home researchers (who were primarily housewives with small children) to earn a supplemental income. Furthermore, the Department did not introduce any testimony before the District Court by home researchers suggesting that they believed they were being taken advantage of by DialAmerica; rather, the home researchers testified that they enjoyed the work—indeed, they in fact *preferred* it to the option of seeking regular in-house employment—and they considered themselves to be their own bosses, rather than the employees of DialAmerica.

Thus, the home researchers made a voluntary and conscious determination *not* to work as supervised in-house employees. The effect of the Department's action, quite simply, was to terminate the home researcher program, and not to offer for the first time an opportunity to work as in-house employees for a minimum hourly wage. The government's action thus resulted solely in the elimination of the homework option preferred by the researchers.

Had the Third Circuit correctly construed and applied this Court's test—principally the factors of control, economic dependence, and integral part of the business—the District Court's decision would have been affirmed in its entirety. For these reasons, as discussed in detail below, certiorari should be granted.

1. The decision of the Third Circuit conflicts with the decisions of this Court and the Department's own guidelines with respect to the issue of control.

The Third Circuit, in holding the home researchers to be "employees" under the FLSA, in effect established a *per se* rule that

all homeworkers are statutory employees and, in doing so, ruled that the clear absence of control in such cases should not be accorded much, if indeed any, significance. The Third Circuit thus created a rule which conflicts with this Court's test and which also is directly contradicted by the Department's guidelines based, of course, on this Court's test.

At common law, the entire test of employment status was simply whether or not the putative employer could exercise control over the manner of the performance of the possible employee's duties. *See Bartels* v. *Birmingham*, 332 U.S. 126, 129 (1947). Under the FLSA*, as interpreted by this Court, control—far from being eliminated as a test of employee status—continues as a principal factor in reaching such a determination. Thus, in *Bartels* v. *Birmingham*, 332 U.S. 126 (1947), this Court explained:

> In United States v. Silk, supra, we held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act was not to be determined *solely* by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. *Obviously control is characteristically associated with the employer-employee relationship* but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In Silk, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were *also* factors that should enter into

*The FLSA itself provides no guidance of a definitional nature with respect to who is or is not an employee. The Act defines "employee" to include any person "acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. §203(d). In turn, the FLSA defines "employee" circularly to be "any individual employed by an employer." 29 U.S.C. §203(e)(1). And, "employ" includes "to suffer or permit to work." 29 U.S.C. §203(g).

> judicial determination as to the coverage of the Social Security Act. It is the total situation that controls.
>
> —332 U.S. at 130 (emphasis added).

While *Bartels* and *United States* v. *Silk*, 331 U.S. 704 (1947), arose under the Social Security Act, this Court held in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947), that decisions "that define the coverage of the employer-employee relationship under the Labor and Social Security Acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." 331 U.S. at 723. And, in *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), this Court— citing to *Silk* and *Rutherford Food Corp.*—made clear that the same inquiry applies to determining the status of homeworkers as it does to in-house workers, and did not so much as suggest that the control test lacks relevance when homeworkers are involved.

In recognition of the foregoing, the Department in its own Field Operations Handbook admits that the "*principal test* relied upon by the courts for determining whether an employment relation exists has been whether the possible employer controls or has the right to control the work to be done by the possible employee to the extent of prescribing how the work shall be performed" (emphasis added). (A 266.) Indeed, in the section of the Department's Handbook specifically concerning whether homeworkers are employees or independent contractors, the very first factor listed for consideration is: "Does the employer have the right to control the manner of the performance of the work or the time in which the work is to be done?" (A 265.)*

*The criteria set forth in the Department's Handbook have been used by courts in determining issues under the FLSA. *See Atkins* v. *General Motors Corp.*, 701 F.2d 1124, 1127-28 (5th Cir. 1983); *Donovan* v. *American Airlines, Inc.*, 514 F. Supp. 526, 533 (N.D. Tex. 1981), *aff'd*, 686 F.2d 267 (5th Cir. 1982). The Third Circuit failed to address or consider the Department's admissions with respect to what it concedes is the "principal test" of control.

In this action the District Court specifically found and held that the home researchers were not controlled or supervised by DialAmerica in the manner of the performance of their work, or in the time and hours in which the work was to be performed. Appendix at 29a-30a, 33a-36a. Clearly then, under the criteria enunciated by this Court—as recognized, adopted and reiterated by the Department in its own Field Operations Handbook—the absence of control by DialAmerica over the researchers should have been a most significant factor in determining whether the home researchers were or were not employees of DialAmerica. The District Court properly so treated the control factor.

However, the Third Circuit held that absence of control, as here, would carry great weight only had "the status of a group of in-house workers" been under consideration. 757 F.2d at 1383, Appendix at 12a-13a. Because it was considering the status of *home* researchers, the Third Circuit determined to adopt a different analysis. Thus, the Third Circuit held that the fact that DialAmerica exercised virtually no control or supervision over the home researchers was, if not entirely irrelevant, without meaningful import because lack of control "inheres in the very nature of homework." *Id.* at 1384, Appendix at 13a.*

*The homeworker cases purportedly relied upon by the Third Circuit are either inapposite, silent on control or at odds with the Third Circuit. Thus, in *Hodgson* v. *Cactus Craft of Arizona*, 481 F.2d 464, 465 (9th Cir. 1973), and *Wirtz* v. *McGhee*, 244 F. Supp. 412, 415 (E.D.S.C. 1965), it was admitted or stipulated that the homeworkers were employees and only other questions were at issue. In the remaining cases the homeworkers constituted virtually the entire work force of the defendant. They were not only an integral part of the business, *they constituted the whole business* because without them no products could be manufactured. Thus —unlike here where DialAmerica had 2,400 admitted employees nationwide and no more than 5 percent of all telephone numbers were found by the home researchers—those homework set-ups were sham attempts to avoid the FLSA in its entirety. *See Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961); *Silent Woman* v. *Donovan*, 585 F. Supp. 447 (E.D. Wisc. 1984); *Hodgson* v. *Rancourt*, 336 F. Supp. 1119, 1122 (D.R.I. 1972) (defendant exercised control over the time in which

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That tautology all but eliminates the control test as a factor in determining employee status and effectively mandates a *per se* rule that all homeworkers are employees subject to the FLSA. This Court has never sanctioned such a rule. Moreover, the Sixth Circuit in *Brandel* v. *Donovan*, 736 F.2d 1114 (6th Cir. 1984), expressly rejected a *per se* rule with respect to the status of migrant farm workers. *Id.* at 1120.

Based upon the foregoing, it is respectfully submitted that the Third Circuit's holding here conflicts with the standards for determining employee status set forth by this Court. Accordingly, certiorari should be granted.

2. The decision of the Third Circuit misconstrues this Court's holdings on the issue of dependence and conflicts with the Sixth Circuit.

The Third Circuit also misconstrued the factor of "economic dependence" in ruling that the home researchers were FLSA employees. In *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947), this Court held that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." And, this Court taught in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947), that the determination of the employer/employee relationship depends "upon the circumstances of the whole activity."

In the instant action the undisputed evidence demonstrated—and the District Court so found (see Appendix at 12a, 36a)—that

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the work was to be done); *Mitchell* v. *Nutter*, 161 F. Supp. 799 (D. Me. 1958); *Walling* v. *Freidlin*, 66 F. Supp. 710 (M.D. Pa. 1946). Other homeworker cases have relied upon control being exercised in deciding the employment question. *E.g.*, *Walling* v. *American Needlecrafts, Inc.*, 139 F.2d 60, 62 (6th Cir. 1943) (homeworkers were "required to comply strictly with the pattern and specifications so furnished"); *Wirtz* v. *Wrightenberry*, 218 F. Supp. 404, 409 (M.D.N.C. 1963).

the home researchers were not economically dependent upon DialAmerica. Thus, the record evidence established that the home researchers did not depend upon DialAmerica for their sole or principal means of support. Home researchers all had the option of working in-house at DialAmerica performing more pervasive research activities and being subject to all the strictures, rules and requirements applicable to its employees, and some of them exercised the option to be in-house employees. In addition, they were free to obtain (as some did) other home research, home work or other work at any time. However, the home researchers, as a group, were simply interested in earning some extra money on their own time. The home researchers as a group were housewives, the vast majority of whom were not candidates for the job market because they had young children and were not available for full or part-time employment. Moreover, the evidence established that the home researchers found that it paid better to work at home for DialAmerica on piece rate basis rather than work in-house at minimum wage.

The District Court held that because the home researchers did not depend upon the money earned from DialAmerica—which some characterized as "pocket money"—they were not economically dependent upon DialAmerica. As the District Court found:

> The totality of circumstances surrounding the employment situation of these home workers indicates that they operated under the barest possible structure, working under their own demands in terms of method and magnitude, supplementing their family's income when convenient.
>
> —Appendix at 36a.

The District Court's approach to "economic dependence" is consistent with that of the Sixth Circuit in *Brandel* v. *Donovan*, 736 F.2d 1114 (6th Cir. 1984). In *Brandel*, migrant pickle harvesters were held not to be employees of the farm operation whose crops they harvested. With respect to dependence, the Sixth Circuit noted that the evidence showed the migrant harvesters had the opportunity to perform similar work at other farms

should the necessity arise and that the harvesters neither worked long hours nor earned low wages. On that record, the Sixth Circuit held that "we cannot say they are economically dependent upon Brandel's business." *Id at* 1120. Thus, where, as here, the purported employee had the option to perform his services elsewhere and was not dependent upon his earnings from the putative employer for his support, the worker is not economically dependent under the Sixth Circuit's view.

Here, however, the Third Circuit took a different approach to the issue of economic dependence. The Third Circuit rejected as a consideration with respect to economic dependence whether or not the worker at issue depends upon his earnings. Appendix at 16a. Nor did the Third Circuit consider the fact that the home researchers had the option to be in-house employees performing more essential and diverse services—an option that does not appear to have been offered to homeworkers in the various cases in which homeworkers, who often comprised virtually the entire work force, were held to be FLSA employees. Rather, with respect to the question as to whether the home researchers were dependent upon DialAmerica in the sense of their availability for continued employment or work being available for them, the Third Circuit stated that:

> The home researchers in this case were not in a position to offer their services to many different organizations. They worked on a continuous basis with DialAmerica and were able to work only when and if DialAmerica was in need of their services.
>
> —757 F.2d at 1385-86, Appendix at 17a.

The record evidence, however, established that home research and other telephone work was available in Northern New Jersey and that several researchers availed themselves of it both during and after the end of the home research program. Further, the record evidence also established that the home researchers had the option to work as in-house employees at DialAmerica.

Therefore, the Third Circuit's holding has no record support because the researchers were in a position to offer their services elsewhere and could work even if DialAmerica had no home work to offer. Moreover, any home researcher could have worked in-house if she so chose. Accordingly, not only does the Third Circuit's view of "economic dependence" conflict with that of the Sixth Circuit, it is also devoid of evidentiary support. Certiorari should be granted.

3. The decision of the Third Circuit conflicts with those of this Court and other federal courts as to what constitutes an "integral part" of a business.

In *United States* v. *Silk*, 331 U.S. 704 (1947), this Court enunciated the concept that workers may be employees when they constitute "an integral part of the business" to which they render service. 331 U.S. at 716. The Third Circuit in this case has construed the "integral part of the business" test in a way that is at odds with economic reality and in conflict with this Court and other federal courts.

The undisputed record evidence demonstrated here that the home researchers were not in any practical sense, or, as a matter of economic reality, either an integral or essential part of DialAmerica's business. The home researchers only worked in that part of DialAmerica's business concerning the sale of magazine subscriptions, and even in that part of the business they located telephone numbers only for the "expire" program, and not for the "sponsor" program. (A 19-20.)

With respect to the expire program, the testimony at the evidentiary hearing demonstrated that since 1979—the period when the maximum statute of limitations here began running—DialAmerica had computer access to over 60 million telephone numbers at a cost to it per number found of less than one cent. (A 228.) The undisputed testimony also showed that the home researchers were only given the least important and most mar-

ginally profitable cards to work on, and that on occasions the numbers located by them—which constituted no more than 3-5 percent of the numbers located in DialAmerica's expire program (A 230)—were thrown out *en masse* rather than being shipped to DialAmerica's sales offices to try to generate sales therefrom. (A 229-232). Finally, when the home research program was discontinued, there was no negative effect on the volume of DialAmerica's business, its manner of operations or its profitability. In fact, DialAmerica had its best sales year ever once it terminated the home researcher program. (A 231.) Thus, once DialAmerica went on a computer search basis in 1979, the home researcher program continued not because it was important to DialAmerica's business but merely because the program was not hurting the company and no one gave any thought as to whether the program should be continued or not. (A 234.) Clearly, the home researcher program operated on the periphery of DialAmerica's business.*

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*Further evidencing that the home researchers were not an integral part of DialAmerica's business is the stark contrast between DialAmerica's home research program and its in-house look-up operation. Thus, the in-house operation was closely supervised, was conducted principally through telephone book research rather than operator assistance, and the persons doing that work had quotas to meet, a work schedule to maintain and clerical obligations to fulfill. The in-house employees were not free to work on a sporadic basis as were the home researchers, who could work one week but not the next. They were not free to reject certain types of work as were the home researchers. The only reason DialAmerica stopped giving work to a home researcher was lack of quality in that the company believed that wrong numbers were deliberately being put on the cards. In contrast, people working in-house were terminated for a variety of reasons, including inability to work scheduled hours, inability to work every week, insubordination, lack of productivity, tardiness and improper dress. (A 210-11, 217-221, 226, 228-229, 237-238.)

Indeed, even the home researchers recognized the difference and, significantly, the vast majority of them chose to remain home researchers rather than seek in-house employment. Home researchers who had worked both in-house and at home testified that while working in-house they were obligated to appear, to follow instructions and to work under supervi-

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The Third Circuit, as it had to, acknowledged that the home researchers located only a minuscule percentage of the telephone numbers sought by DialAmerica, but held that this fact "bears little relevance to the integral-economic-relationship factor." 757 F.2d at 1385, Appendix at 15a. According to the Third Circuit, it is merely the nature of the work performed, rather than whether such work has any meaningful impact upon the business to which it is provided or whether it constitutes an interdependent and necessary step in the business' operation, that determines whether the service rendered constitutes an integral part of the business. This construction of the "integral part of the business" test puts the Third Circuit at odds with this Court and other federal courts both with respect to on-site and homeworkers.

With respect to on-site workers the leading case is *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947). There, beef boners were held to be employees of the slaughterhouse in which they worked because they were indisputably an integral part of its operations. Thus, the business in question existed to produce boned beef for the United States Army. Without the services of the beef boners at issue there, by definition there would have been no boned beef for the company to have delivered under its contracts with the Government. The beef boners worked on the company's premises, and were part of an integrated production line in which they were one of several interdependent steps leading to the end result of fulfilling the company's boned beef contracts with the United States. Clearly from the facts of that case, the conclusion that the beef boners were an integral part of the business was based not upon the mere nature

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sion. In contrast, while working as home researchers, they felt no obligation to DialAmerica—as opposed to themselves—to do the work at all, much less under a regular, controlled basis. (A 50-54, 60-61, 192-193.) This testimony parallels that of other home researchers who made clear that they felt it was their decision whether to take and do the work as a home researcher and not that they felt an obligation to DialAmerica to perform as an employee. (*E.g.*, A 69-70, 186, 205, 210-211.)

of the work, but upon the economic reality that their services meaningfully impacted upon the operation and success of the business in which the work was rendered.*

A review of the homeworker cases decided by this Court and other federal courts demonstrates that in every instance, save here, the homeworkers held to be employees were subject to control and/or constituted the entire work force of the business in question and were thus, indisputably, an integral part thereof. In fact, virtually every homeworker case except for this action involved a sham effort to avoid the FLSA in its entirety.

Thus, in *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), the "cooperative", which was formed to manufacture, sell and deal in knitted, crocheted and embroidered goods of all kinds, admitted only to having a general manager and "a few" employees engaged in trimming and packaging. *Id.* at 29. The goods sold by the cooperative were produced at home by its 200 "member" workers who were "regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates." *Id.* at 32. Thus, the 200 homeworkers there were not only an integral part of the business, they were the entire business, because without them

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*The federal courts have traditionally followed this analysis. *E.g., Brennan* v. *Sand Products, Inc.*, 371 F. Supp. 236, 239 (W.D. Okla. 1973) ("the truckers are not an integral part of the Defendant's business but are only an insignificant part thereof and the Defendant could easily dispense with their services and still profitably continue in business"); *Wirtz* v. *San Francisco & Oakland Helicopter Airlines, Inc.*, 244 F. Supp. 680, 684 (N.D. Cal. 1965) ("Unlike the *Rutherford* case, the functions performed by [the porters] were not an independent step in the essential operation of [the defendant], but rather amounted to a convenient activity performed on the periphery of this company's principal endeavor"); *Wirtz* v. *Manchester Sand, Gravel & Cement Co.*, 236 F. Supp. 885, 887 (D.N.H. 1964) ("These truckers account for thirty per cent or less of all the company's outside hauling to customers. . . . In addition, the company has its own trucks to do hauling on the company's premises; these trucks are operated by admitted employees of the company").

the cooperative would have had no products to sell and would have ceased to exist. This situation has no bearing on the home researchers here who worked on the periphery of DialAmerica's business and had no effect upon its operations or profitability.

Similarly, in the oft-cited case of *Walling* v. *American Needlecrafts, Inc.*, 139 F.2d 60 (6th Cir. 1943), the company in question had 40 admitted employees and claimed that the 500 homeworkers who actually completed the manufacture of the products sold by the company were independent contractors. The 500 homeworkers in question were rural Kentucky women who added handwork, quilting and needle-work to bedspreads supplied to them by the company with stamped patterns to follow, paper models for monograming and instructions as to the kind and color of thread to be used. As the Court found, the workers were "required to comply strictly with the pattern and specifications so furnished." 139 F.2d at 62. Thus, not only was the manner of performance strictly controlled in the *American Needlecrafts* action, but the homeworkers in question were an integral part of the business in that it could not exist without their unique handcraft work added to the basic bedspread supplied by the company.*

**Accord, e.g., McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F.2d 633, 635 (4th Cir.), *cert. denied*, 338 U.S. 900 (1949) (between 1,800 and 2,000 women added drawstrings to pouches, an "essential" step in the manufacture of the finished product sold by the business); *Hodgson* v. *Rancourt*, 336 F. Supp. 1119, 1121-22 (D.R.I. 1972) (home typists provided entire output of typing service and were an integral part of the business because without such services the business could not complete work contracted to perform); *Mitchell* v. *Nutter*, 161 F. Supp. 799, 801 (D.Me. 1958) (about 150 homeworkers supplied the business' entire output of goods sold). In *Silent Woman* v. *Donovan*, 585 F. Supp. 447 (E.D. Wisc. 1984) the court found that with respect to the particular homeworkers there, "[a]lmost identical fact situations arose in *Walling* v. *American Needlecrafts*, 139 F.2d 60 (6th Cir. 1943) and *Mitchell* v. *Nutter*, 161 F. Supp. 799 (N.D.Me. 1958)." 585 F. Supp. at 452. As shown above, in both cases cited in the *Silent Woman*, the homeworkers constituted virtually the entire work force manufacturing the product sold.

Clearly, the Third Circuit's view of what services constitute an integral part of a business ignores economic and practical reality and invites the Department to insinuate itself in work relationships which are devoid of the abuses sought to be prevented by the statute and which are specifically preferred by the home researchers over an available option of regular in-house employment. The Third Circuit's view results in a finding that persons working on the periphery of a company's business and rendering a marginal service with no impact upon its operations or profitability are nevertheless its employees, merely because the nature of their work relates to the business of the company. Certiorari should be granted to correct this improper construction of the "integral part of the business" test.

* * *

In sum, the Third Circuit has established a separate category for homeworkers that mandates a finding that they are *per se* "employees" under the FLSA. The Third Circuit held that for homeworkers the complete absence of control by the putative employer over the performance of their services is of no importance, even though such a factor must be considered for in-house workers.

The Third Circuit also held that it is of no importance that the homeworkers did not consider themselves economically dependent on the work; that they were doing the work only to earn, in their own words, some extra "pocket" money; that they had the option of performing home services for other companies, as some did; and that, moreover, they all had the option of seeking in-house employment at DialAmerica and earning a fixed hourly wage by performing more varied and complex researching and other activities on a daily basis under close supervision, and that the home researchers as a group rejected that option and preferred to remain as home researchers.

The Third Circuit also held that it was of no importance that the home researchers operated at the very periphery of DialAmerica's business and were not in any respect an integral or interdependent part of its business. Indeed, in this regard the

home researcher program stands in marked contrast with the homeworker operations that have traditionally been found to come within the prescriptions of the FLSA, *i.e.*, companies that used homeworkers to perform essential, if not the entire, operations and thereby sought to avoid paying a minimum wage. The record evidence established that DialAmerica's home researcher program was not such a sham calculated to avoid the prescriptions of the FLSA. The economic reality of the program—from the perspective of both the company and the home researchers—compels the conclusion that under this Court's test, as applied by the District Court, the home researchers are *not* "employees" under the FLSA. The Third Circuit failed to consider the economic reality of the situation or otherwise to construe correctly this Court's test.

Conclusion

The issues raised in this petition deserve the attention of this Court, since the question of the proper application of the FLSA to homeworkers will arise with increasing frequency in the future. For this and the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor, Appellant in No. 84-5217, Appellee in No. 84-5245

v.

DIALAMERICA MARKETING, INC., Appellant in No. 84-5245, Appellee in No. 84-5217

Nos. 84-5217, 84-5245.

United States Court of Appeals,
Third Circuit.

Argued Oct. 18, 1984.

Decided March 13, 1985.

Rehearing and Rehearing In Banc
Denied April 9, 1985.

As Amended April 18, 1985.

Secretary of Labor appealed from the United States District Court for the District of New Jersey, Herbert J. Stern, J., which entered judgment for telephone marketing firm in action brought by Secretary under the Fair Labor Standards Act. The Court of Appeals, Becker, Circuit Judge, held that: (1) home researchers were employees of telephone marketing firm for purposes of minimum wage provisions of the FLSA; (2) home researchers who distributed telephone number research cards to other home researchers were not employees under the FLSA; and (3) telephone marketing firm was not entitled to recover attorney fees under the Equal Access to Justice Act.

Affirmed in part, reversed in part, and remanded.

Francis X. Lilly, Solicitor of Labor, Joseph Woodward, Acting Associate Sol., Linda Jan S. Pack, for appellate litigation.

Claire Brady White (argued), U.S. Dept. of Labor, Washington, D.C., for appellant in No. 84-5217 and appellee in No. 84-5245.

Charles I. Poret (argued), Mark R. Kook, Sharfman, Shanman, Poret & Siviglia, New York City, for appellant in No. 84-5245 and appellee in No. 84-5217.

Before GIBBONS, BECKER, Circuit Judges, and VAN DUSEN, Senior Circuit Judge.

OPINION OF THE COURT

BECKER, Circuit Judge.

This opinion concerns an appeal by the Secretary of Labor (the "Secretary") from the district court's judgment for defendant, DialAmerica Marketing, Inc., in an action brought by the Secretary under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982) (the "FLSA"). The Secretary alleged that DialAmerica had failed to comply with the minimum-wage and record-keeping provisions of the FLSA. The district court determined that the two groups of workers in question, persons who research telephone numbers for DialAmerica in their homes and those who also distribute telephone-research work to other home researchers ("distributors"), are independent contractors, not "employees" subject to the provisions of the FLSA. The court refused, however, to grant defendant's request for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982), holding that the Secretary's position in the case, though incorrect, was substantially justified.

Because we believe the district court misapplied the relevant legal test for determining "employee" status under the FLSA, we hold that the court erred in concluding that the home researchers were not employees of DialAmerica. On the other

hand, we hold that the district court did not err in its conclusion that the distributors were independent contractors rather than employees. Moreover, we agree with the court's determination that the Secretary's position in this case was substantially justified and therefore that DialAmerica is not entitled to an award of attorneys' fees. Accordingly, we will in part affirm and in part reverse the judgment of the district court. Further, we will remand the case so that the district court may determine whether DialAmerica has in fact complied with the requirements of the FLSA in connection with its employment of the home researchers.

I. *FACTS*[1]

DialAmerica Marketing, Inc., is a telephone marketing firm that operates in twenty states and maintains its principal place of business in Teaneck, New Jersey. A major aspect of DialAmerica's business is the sale of magazine renewal subscriptions by telephone to persons whose subscriptions have expired or are near expiration. Under this "expire" program, publishers supply DialAmerica with the names and addresses of subscribers, and DialAmerica locates phone numbers for these subscribers and telephones them in an effort to sell renewal subscriptions.

Initially, DialAmerica located subscribers' phone numbers by employing in-house researchers who would find numbers by consulting telephone books and calling directory-assistance operators. In 1976, DialAmerica initiated its home-researcher program as a method of increasing its capacity to locate needed telephone numbers. Under the program, persons would travel to DialAmerica's office in Teaneck and pick up cards, each of which contained the name and address of a subscriber whose

[1]The facts recited in this opinion are undisputed except as otherwise noted.

telephone number was needed. They would then take these cards home, use telephone books or operators to locate the telephone numbers of the persons listed, write the numbers on the cards in a specified manner, and then return the completed cards to DialAmerica's office. The home-research program remained in effect until 1982, when it was discontinued.

In June 1979, DialAmerica began a computerized telephone-number search operation. During the period from 1979 to 1982, this operation accounted for the locating of about 50% of all telephone numbers searched by DialAmerica. Another 20% of the numbers were located by the company's in-house researchers. The home-research program accounted for the discovery of about 4%-5% of all numbers sought; the remainder apparently were never found.

Upon deciding to begin the home-research program, DialAmerica sought researchers by placing a total of five newspaper advertisements, the last of which ran in May 1979. After that date, prospective home researchers approached DialAmerica after learning about the program from others. Those desiring such work met with an officer of the company. During the meeting, they were instructed how properly to complete the magazine expire cards, and they were asked to sign a document labeled an "Independent Contractor's Agreement." DialAmerica never rejected anyone who applied for such work, although it did subsequently discharge some home researchers who performed their work inadequately.

Upon signing the agreement to do home-research work, a worker was given an initial box of 500 cards to be researched. The worker was expected to set up an appointment to return the cards one week later. Appointments were designed to prevent too many of the home researchers (generally women some of whom brought their small children along) from being present in the office at one time.

Home researchers were free to choose the weeks and hours they wanted to work and the number of cards they wished to research (subject to a 500-card minimum per batch and to the sometimes-limited availability of cards). DialAmerica instructed the researchers not to look for the phone numbers of schools, libraries, government installations, or hospitals. The researchers were instructed to keep all duplicate cards separate. DialAmerica required the use of a black ink or Flair pen and sold such pens to the researchers. The researchers were required to place their initials and the letter "H" (for home researcher) on each card they completed. When DialAmerica installed a machine to read and process the completed cards automatically, DialAmerica required that the home researchers place numbers on the cards by writing them in ink around dots pre-printed on the cards. Finally the home researchers were instructed not to wear shorts when they came to the office to pick up or deliver cards. DialAmerica did not, however, require the home researchers to keep records of the hours that they worked.

During the course of this program, six or seven of the home researchers acted as distributors for DialAmerica, picking up and delivering the cards of other home researchers. In some cases, the distributors recruited new home researchers and instructed them as to the proper method of completing the cards. Initially, DialAmerica instructed the distributors to require each of their distributees to sign the same independent contractor's agreement that was given to the other home researchers. DialAmerica retained copies of these signed agreements. Later in the program, however, DialAmerica chose not to require distributees to sign the agreements, and it discarded the ones that it had in its possession.

When the program began in 1976, DialAmerica paid its home researchers five cents for every completed telephone-number card. At the same time, DialAmerica was paying its

in-house researchers the minimum-wage hourly rate. The piece rate paid to home researchers was eventually raised to seven cents and then to ten cents per card. On special projects, DialAmerica set the piece rate higher to compensate for the lower percentage of correct numbers that were likely to be found. Generally, one week after a home researcher had returned a group of cards, DialAmerica would make payment to that researcher of a check equal to the piece rate times the number of cards completed. DialAmerica made no deductions from these checks. Distributors were paid a lump sum equivalent to one cent more than the going piece rate for every completed card they returned to DialAmerica, regardless of whether the card had been completed by them or their distributees. Initially, DialAmerica instructed the distributors to pay distributees the going piece rate and to keep the remaining one cent per card for themselves. Later, however, DialAmerica gave no instructions as to the amount to be paid to distributees, allowing the distributors to negotiate their own piece rates.

II. *PROCEDURAL HISTORY*

The Secretary of Labor filed the complaint in this action in the United States District Court for the District of New Jersey on December 30, 1981, alleging that DialAmerica was willfully compensating the home researchers and distributors at a rate below the minimum wage, in violation of 29 U.S.C. §§ 206, 215(a)(2), and that DialAmerica had willfully failed to keep adequate records of its employees' wages, hours, and other conditions of employment, in violation of 29 U.S.C. §§ 211, 215(a)(5). The Secretary sought to enjoin DialAmerica from further violating the FLSA and to obtain other appropriate relief, including the payment of wages found to be due and owing. DialAmerica denied the Secretary's allegations, contending that its home researchers and distributors were not "employees" under the FLSA. Nevertheless, on June 1, 1982,

DialAmerica discontinued its home-researcher program as a result of the filing of this lawsuit.

At a status conference, the district court, believing that there were no material facts in dispute, suggested to counsel that both parties attempt to stipulate the facts in the case and then file cross-motions for summary judgment.[2] Counsel agreed to do so, but each side reserved the right to present testimony on any issues of fact that remained in dispute. As it developed, these remaining issues of fact included:

> (1) the extent to which home researchers and distributors were dependent on DialAmerica;
>
> (2) the extent to which they had an opportunity for profit or loss;
>
> (3) the extent to which they exercised initiative, business judgment, or foresight in their activities;
>
> (4) the extent of any financial investment in conjunction with their work for DialAmerica; and
>
> (5) the extent to which the services provided by the home researchers and distributors were an integral part of DialAmerica's business.[3]

The district court then held a two-day evidentiary hearing in which the Secretary presented ten witnesses and DialAmerica presented seven witnesses. On January 26, 1984, in an order

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[2]Counsel and the court had already agreed to bifurcate the case. First, the court would determine whether the workers in question were "employees" under the FLSA. Second, if they were held to be "employees," the court would then consider whether they were entitled to backpay or other relief. Any action on the second part of the case was to be suspended until the first part was completed.

[3]*See Donovan v. DialAmerica,* Civil No. 81-4020 (D.N.J. June 4, 1982) (pre-trial order, part VIII).

accompanied by a letter opinion, the court granted the motion for summary judgment which DialAmerica had filed pursuant to Fed.R.Civ.P. 56. The court subsequently filed an order and accompanying letter opinion, denying DialAmerica's request for attorneys' fees. The Secretary now appeals the district court's grant of summary judgment (No. 84-5217). DialAmerica appeals the court's denial of its application for the award of attorneys' fees (No. 84-5245). Both appeals were timely. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Given that there were several disputed issues of material fact—which the district court resolved only after taking testimony from seventeen witnesses—we find it difficult to understand why the court characterized its decision as a summary judgment. Although the court inappropriately labelled its judgment, its course of action was correct. The two-day hearing was sufficient for the court to find the relevant facts, and we would gain nothing beyond delay by reversing the district court's grant of summary judgment and remanding the case for further fact-finding. It appears that there exists no additional documentary evidence or testimony which, if presented at trial, would have aided significantly in the adjudication of this case. Thus, we will simply treat the court's letter opinions as the findings of fact and conclusions of law required by Fed.R.Civ.P. 52,[4] and its orders as judgments entered after trial pursuant to Fed.R. Civ.P. 58. We will review the court's findings of fact under a

[4]The court's letter opinion of January 26, 1984, includes some statements that are most accurately characterized as findings of fact. Examples of such findings by the court include statements that the home-research work at issue did not require a great investment nor much skill, presented little opportunity for profit or loss, and operated under the barest possible structure. *Donovan v. DialAmerica Marketing, Inc.*, Civil No. 81-4020, letter op. at 7 (D.N.J. Jan. 26, 1984). Another example is the court's observation that "distributors were small business persons, who controlled their own fleet of distributees subject only to the scantiest oversight by DialAmerica." *Id.* at 8.

"clearly erroneous" standard. Our review of the district court's legal conclusions is, of course, plenary.

III. *THE APPLICABLE LAW; THE SUREWAY CLEANERS TEST*

Congress and the courts have both recognized that, of all the acts of social legislation, the Fair Labor Standards Act has the broadest definition of "employee." *See* 81 Cong.Rec. 7657 (remarks of Senator Hugo L. Black), *Equal Employment Opportunity Commission v. Zippo Manufacturing Co.*, 713 F.2d 32, 37 (3d Cir. 1983). In determining whether a worker is an "employee" of another person or organization within the purview of the FLSA,[5] the Supreme Court, in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), emphasized that the circumstances of the whole activity should be examined rather than any one particular factor. *Id.* at 730, 67 S.Ct. at 1476; *see also Bartels v. Birmingham*, 332 U.S. 126, 127, 67 S.Ct. 1547, 1548, 91 L.Ed. 1947 (1947) (determination of "employee" status under the Social Security Act); *United States v. Silk*, 331 U.S. 704, 705, 67 S.Ct. 1463, 1464, 91 L.Ed. 1757 (1947) (same).

In *Rutherford*, the Court held that boners who worked in a slaughterhouse were employees under the FLSA, even though they were paid collectively on a piece-rate basis, owned their own tools, and worked under individual employment contracts.

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[5]As the district court aptly observed, the definitions included in the FLSA provide little assistance in determining the meaning of the word "employee." "Employee" is defined by the Act as "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1982). "Employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. § 203(d) (1982). Finally, the Act states " 'employe' includes to suffer or permit to work." 29 U.S.C. § 203(g) (1982).

Rutherford, 331 U.S. at 730, 67 S.Ct. at 1746. Specific factors examined by the *Rutherford* Court in rendering its decision included: whether the work being done is part of the integrated unit of production; whether the workers shift from one workplace to another as a unit; whether managers from the alleged employer keep in close touch with the workers; and whether the work is more like piecework than an enterprise dependent for success on the workers' initiative, judgment or foresight. *Id.* at 729-30, 67 S.Ct. at 1476-77.

Recently, the Court of Appeals for the Ninth Circuit, in *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981), refined the test for "employee" status originally set forth initially by the Supreme Court in *Rutherford*. This test lists six specific factors for determining whether a worker is an "employee":

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business.

656 F.2d at 1370 (quoting *Real v. Driscoll Strawberry Associates*, 603 F.2d 748, 754 (9th Cir. 1979)).

In addition, *Sureway Cleaners* instructs that neither the presence nor absence of any particular factor is dispositive and that courts should examine the "circumstances of the whole activity," 656 F.2d at 1370 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772 (1947)), and should consider whether, as a matter of economic

reality, the individuals "are dependent upon the business to which they render service." 656 F.2d at 1370 (citing *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1549, 91 L.Ed. 1947 (1947)). The *Sureway Cleaners* test has been previously cited with approval by this court in dicta. *See Zippo*, 713 F.2d at 36-37 (3d Cir. 1983). We now adopt it as the standard for determining "employee" status under the FLSA, and we will proceed to analyze the district court's decision in relation thereto.

IV. *THE DISTRICT COURT OPINION*

The district court concluded that neither those persons who performed telephone-number research at home nor those who distributed search cards to the home researchers were "employees" under the FLSA. In reaching its conclusion, the court did not apply the *Sureway Cleaners* test as such. It did, however, rely on the judicial decisions upon which the *Sureway Cleaners* test is based. Moreover, the court identified as relevant all but one of the elements of the *Sureway Cleaners* test.[6] Nevertheless, the court's opinion is based on only two of these elements: (1) the extent of DialAmerica's control over the home researchers; and (2) the extent to which the home researchers were economically dependent on DialAmerica. The court reasoned that, because these researchers worked at home without supervision

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[6]The district court relied primarily on the five factors specified by the Supreme Court in *United States v. Silk*, 331 U.S. 704, 716, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772 (1947), as well as the general economic-dependence consideration propounded by the Court in *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1549, 91 L.Ed. 1947 (1947). Only the integral-economic relationship factor, which is the sixth factor listed in *Sureway Cleaners*, was not identified as relevant by the district court.

and at the dates and times of their own choosing, DialAmerica exercised little control over them. Moreover, the court found that the home researchers were not economically dependent on DialAmerica because, for most of them, the money they earned from DialAmerica was not the primary source of family income, but merely "pocket money." We turn to an examination of the district court's analysis in the context of the entire *Sureway Cleaners* test—the six itemized factors and the economic-realities consideration.

V. *THE HOME RESEARCHERS*

In its opinion, the district court conceded that three of the six *Sureway Cleaners* factors, when applied to the home researchers, weighed in favor of the conclusion that they were "employees." As the district court stated:

> [I]t cannot be denied that, for the most part, the investment of these workers was not great, the opportunity for profit and loss was small and the skills required were few.

Donovan v. DialAmerica Marketing, Inc., Civil No. 81-4020, letter op. at 7 (D.N.J. Jan. 26, 1984). These findings are not only supported in the record, they are clearly correct.[7]

The district court devoted most of its discussion, however, to explaining that defendant had very little control over the manner in which the home researchers did their work. The court emphasized that the home researchers had the freedom to work at any time and for as many hours as they desired, and that

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[7]DialAmerica had contended that some of the home researchers made a significant investment in their business, particularly in the purchase of speed dialers and telephone directories.

they were not directly supervised by defendant. *See id.* at 4-5.[8] Had the district court been analyzing the status of a group of in-house workers, the court's emphasis on these facts would have been appropriate. But in the context of this case—one involving homeworkers—the court's emphasis was misplaced.

That the home researchers could generally choose the times during which they would work and were subject to little direct supervision inheres in the very nature of home work. Yet, courts have held consistently that the fact that one works at home is not dispositive of the issue of "employee" status under the FLSA. In a seminal decision, *Goldberg v. Whitaker House Cooperative,* 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961), the Supreme Court held that members of a cooperative who made knitted goods in their homes and were paid on a piece-rate basis,[9] were "employees" under the FLSA. *Id.* at 33, 81 S.Ct. at 936. The Court examined, *inter alia,* the legislative history of the FLSA and determined that, in general, homeworkers were intended to be encompassed by the Act. *See id.* at 30-32, 81 S.Ct. at 935-36. The Court then examined the specific homeworkers at issue and, upon analyzing the economic reality of their whole situation, concluded that they were indeed "employees":

> The members are not self-employed; nor are they independent, selling their products on the market for what-

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[8]The court did recognize that defendant exercised some "minimal oversight" over the home researchers, such as requiring that the search cards be filled out properly, that cards be returned generally one week after obtaining them, and that proper dress be worn while visiting the office. The court, however, found little significance in these requirements.

[9]The Supreme Court had held earlier that workers paid on a piece-rate basis were encompassed by the Fair Labor Standards Act. *See United States v. Rosenwasser,* 323 U.S. 360, 361, 65 S.Ct. 295, 296, 89 L.Ed. 301 (1945).

> ever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates. Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers.

Goldberg, 366 U.S. at 32-33, 81 S.Ct. at 936 (footnote omitted).

Other federal court rulings have been consistent with *Goldberg*, holding that homeworkers in various situations were "employees" under the FLSA.[10] Thus, the facts relied on by the

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[10]*See e.g.*, *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 467 (9th Cir. 1973) (persons who manufacture novelty and souvenir gift items in their homes and are compensated at a piece rate are entitled to the minimum wage under the FLSA); *Silent woman, Ltd. v. Donovan*, 585 F.Supp. 447, 451 (E.D.Wis. 1984) (persons who do needlework in their homes for a corporation, set their own hours, and are compensated at a piece rate set by the corporation are "employees" under the FLSA); *Hodgson v. Rancourt*, 336 F.Supp. 1119, 1122 (D.R.I. 1972) (persons who type labels and envelopes in their home for defendant and who had to complete work by a certain date set by defendant were "employees" of defendant under the FLSA); *Wirtz v. McGhee*, 244 F.Supp. 412, 415 (E.D.S.C.1965) (persons manufacturing doll clothes and bodies in their homes constituted "employees" of defendant); *Mitchell v. Nutter*, 161 F.Supp. 799, 806 (D.Me. 1958) (homeworkers who knitted and crocheted infants' outerwear for distributor at a piece rate were "employees" under FLSA); *Walling v. Freidlin*, 66 F.Supp. 710, 712 (M.D.Pa.1946) (expressly overruling an earlier decision, *Walling v. Todd*, 52 F.Supp. 62 (M.D. Pa.1943), and holding that homeworkers to whom employer delivered waste rags, which homeworkers cut, served, and wound into balls, were "employees").

district court in concluding that defendant had only a slight degree of control over the manner in which the home researchers did their work were, to a large extent, insignificant. The district court therefore misapplied and over-emphasized the right-to-control factor in its analysis.

The district court did not apply two other factors specified in the *Sureway Cleaners* test: the degree of permanence of the working relationship and whether the service rendered is an integral part of the alleged employer's business. The working relationship between the home researchers and DialAmerica was, for the most part, not a transitory one. Although there was testimony presented that several researchers performed telephone calling services for other organizations following the termination of their work for the defendant, this was not true generally. Moreover, there was no evidence to show that more than three among dozens of home researchers performed similar services for another organization while he or she was working for the defendant. In short, the home researchers did not transfer their services from place to place, as do independent contractors. *See Donovan v. Sureway Cleaners,* 656 F.2d 1368, 1372 (9th Cir. 1981). Each worked continuously for the defendant, and many did so for long periods of time. As such, the permanence-of-working-relationship factor indicates that the home researchers were "employees" of the defendant.

The district court also did not expressly consider whether the service rendered by the home researchers was an integral part of the defendant's business. Given the evidence in the record, we conclude that it was. Although DialAmerica contends that beginning in June 1979, the home researchers accounted for the location of only 4%-5% of the total number of telephone numbers sought by defendant, this contention bears little relevance to the integral-economic-relationship factor. The factor relates not to the percentage of total work done by the workers

at issue but to the nature of the work performed by the workers; does that work constitute an "essential part" of the alleged employer's business? *See Sureway Cleaners*, 656 F.2d at 1372; *Hodgson v. Ellis Transportation Co.*, 456 F.2d 937, 940 (9th Cir. 1972). In other words, regardless of the amount of work done, workers are more likely to be "employees" under the FLSA if they perform the primary work of the alleged employer.

In this case, the primary work of the defendant is locating phone numbers of various people and calling them to sell particular products. The home researchers were engaged in the location of phone numbers, and their work was therefore an integral part of defendant's business. Thus, consideration of the integral-economic-relationship factor also weighs in favor of the conclusion that the home researchers were "employees" of the defendant.

The final consideration included within the *Sureway Cleaners* test is whether, as a matter of economic reality, the workers at issue " 'are dependent upon the business to which they render service.' " *Sureway Cleaners*, 656 F.2d at 1370, (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1549, 91 L.Ed. 1947 (1947)). The district court clearly misinterpreted and misapplied this part of the analysis. The court reasoned that, because many of the home researchers used the money they earned from their work only as a secondary source of income for their households, they were not economically dependent upon DialAmerica. There is no legal basis for this position. The economic-dependence aspect of the *Sureway Cleaners* test does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life, as the district court suggests. Rather, it examines whether the workers are dependent on a particular business or organization for their continued employment. *See Bartels v. Birmingham*, 322 U.S. at 130, 67 S.Ct. at 1549; *Equal Employment Opportunity Commission v. Zippo*

Manufacturing Co., 713 F.2d at 37; *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1311 (5th Cir.), *cert. denied*, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1976).[11]

The home researchers in this case were not in a position to offer their services to many different businesses and organizations. They worked on a continuous basis with DialAmerica and were able to work only when and if DialAmerica was in need of their services. Consequently, the home researchers were economically dependent on DialAmerica, indicating that they were indeed "employees" of the defendant under the FLSA.

In summary, of the six factors and one general consideration identified by *Sureway Cleaners* as the basis for determining "employee" status, only one factor weighs in favor of the conclusion that the home researchers were not "employees." And that factor, the right-to-control factor, was overemphasized by the district court because homeworkers by their very nature are generally subject to little supervision and control by an alleged employer. Federal courts have consistently held homeworkers of many varieties to be "employees" under the FLSA.

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[11]Although the district court's interpretation of "economic dependence" may appear to be reasonable on the surface, it would lead to senseless results if carried to its logical conclusion. Consider the following example. Two persons do exactly the same work for the same organization. The first worker, who relies on the job as a primary source of income, would be considered "economically dependent" on the organization and thus an "employee" subject to the minimum-wage provisions of the FLSA. The other worker, whose spouse provides the primary source of family income, would not be considered "economically dependent" and thus would not necessarily be entitled to receive the minimum wage. Moreover, upon the first worker's subsequent marriage to a spouse who would provide the primary source of family income, he or she might then lose the status as an "employee," resulting in a possible reduction in wage rate.

Thus, although most of the facts in this case are undisputed and we accord due deference to the district court's findings as to the remaining disputed facts, we nevertheless must conclude, as a matter of law, that the district court erred in holding that the home researchers were not "employees" of the defendant under the FLSA. Accordingly, we will reverse that portion of the district court's judgment and remand so that the district court may calculate the amount of back pay, if any, to which the home researchers are entitled under the minimum-wage provisions of the Act.

VI. *THE DISTRIBUTORS*

The district court concluded that the six or seven home researchers who distributed telephone-number research cards to the other home researchers were also not "employees" under the FLSA. In reaching its decision, the court again did not consider all of the factors specified in the *Sureway Cleaners* test for determining "employee" status. Nevertheless, upon application of the entire *Sureway Cleaners* test, we agree that the distributors were not "employees" and were not subject to the minimum-wage protection of the FLSA for their work in delivering cards to and from other home researchers.[12]

With respect to the right-to-control factor, the district court correctly found that the defendant exercised little control over the distributors' delivery of cards. The distributors were permitted to recruit their own distributees, and some of them did so. Although the defendant initially kept records of all distribu-

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[12]We recognize that the distributors performed home research work for DialAmerica in addition to their distribution work. We hold that, while performing home research for DialAmerica, these persons were "employees" under the FLSA and entitled to payment of the minimum wage.

tees, it eventually relied on the distributors to maintain those records.

Moreover, we also defer to the district court's finding that the distributors risked financial loss if they did not manage their distribution network properly. The distributors were responsible for paying all of their expenses, which consisted primarily of transportation expenses. And each distributor had the authority to set the rate at which its distributees would be paid.[13] Thus, theoretically at least, distributors could lose money if their expenses outweighed their revenues.

The distributors also had to make an investment in their business. Again, this investment consisted primarily of transportation expenses.[14] One distributor also used paid advertising in an effort to gain more distributees. Consideration of the investment factor, therefore, supports the conclusion that the distributors were independent contractors.

The distributors' need for special skills to do their work was

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[13]DialAmerica paid the distributors in a lump sum equal to one cent per card more than the piece rate times the number of completed cards returned by the distributor, regardless of whether the cards had been completed by the distributors or by one of their distributees. Initially, DialAmerica instructed the distributors to pay their distributees the going piece rate for each card completed and to keep the remaining one cent per card for themselves. Several years later, however, DialAmerica stopped giving instructions on how distributees were to be paid. Several distributors testified that they paid their distributees less than the going piece rate. One distributor testified that the rate he paid a distributee depended on the relative transportation expenses he incurred in delivering cards to and from that distributee.

[14]Transportation expenses could be significant for distributors who maintained a wide distribution area. One woman testified that she regularly traveled from her home in New Jersey to Long Island, New York, where some of her distributees lived.

another finding of fact identified by the district court as a basis for its conclusion. The distributors needed to possess some degree of managerial skill to ensure that their revenues exceeded expenses. Moreover, it was necessary for the distributors to be able to keep records regarding the number of cards delivered to, and completed by, each distributee so that proper payment could be made. Some distributors benefitted from their skill in persuading others to become distributees, and they certainly exercised business-like initiative in this regard. The "skill" factor favors independent-contractor status.

In terms of the permanence of the working relationship, many distributors did perform delivery work for DialAmerica continuously for several years. And there was no evidence that the distributors were doing similar delivery work for any other organizations, although they were free to do so. Thus, consideration of this factor would weigh in favor of treating distributors as "employees" of DialAmerica.

The distribution of cards to home researchers, *per se*, is probably not an integral part of defendant's business. As stated previously, defendant's business consists primarily of locating telephone numbers for various people and calling them to sell particular products. The delivery of telephone-number search cards to home researchers is more properly characterized as an incident to defendant's business, rather than an integral part of it. As such, application of this factor in the *Sureway Cleaners* test favors the conclusion that the distributors are not "employees" as defined by the FLSA.

Finally, the *Sureway Cleaners* test examines the circumstances of the whole activity and considers whether, in this case, the distributors are economically dependent on the defendant. It is more likely than not that the distributors were economically dependent. Although defendant did not prohibit these persons

from performing distribution work for other organizations, there was no evidence that any of them did so, either during or following the period in which they worked for the defendant. Presumably, all of the distributors ceased doing distribution work when defendant ceased providing such work for them. Thus, for the most part, the distributors were dependent on DialAmerica for continuing their work as distributors.

In summary, all of the factors in the *Sureway Cleaners* test, when applied to the distributors, do not lead to the same conclusion. Having considered the evidence with appropriate deference to the district court's fact-finding, we note that some factors support the conclusion that the distributors are "employees," while others do not. Although the question is admittedly close, we hold that the distributors *qua* distributors were not employees under the FLSA because they operated more like independent contractors than like employees of DialAmerica. The distributors were subject to minimal oversight or control over their distribution activities. Moreover, they faced a real opportunity for either a profit or loss in their operations, depending upon the amount of their investment and their skills in management. Finally, their work as distributors was not an integral part of DialAmerica's business and thus was less likely to be performed by an "employee" of DialAmerica.

As a result of our decision in this case, DialAmerica may be held liable for not paying the home researchers the minimum wage, even though the distributors—who are held not to be employees of DialAmerica—had discretion in setting the pay rates of some of these home researchers (their distributees). Such a result is possible because the distributors' status as independent contractors does not necessarily imply that they have the sole responsibility of paying their distributees the minimum wage required by the FLSA. Another employer—in this case, DialAmerica—may share that responsibility. *See Real v. Driscoll*

Strawberry Associates, Inc., 603 F.2d 748, 756 (9th Cir. 1979) (the independent-contractor status of one party standing in the position of the direct employer of crop growers does not, as a matter of law, prevent the contractee from being a joint employer of these crop growers under the FLSA); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir.) (claimed independent-contractor status of crew leaders, who supplied field workers for defendant-harvester, did not negate the possibility that defendant was an "employer" of the workers for FLSA purposes), *cert. denied sub nom. Griffin & Brand of McAllen, Inc. v. Brennan*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed. 2d 51 (1973); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S.Ct. 894, 898, 11 L.Ed.2d 849 (1964) (the independent-contractor status of firm under contract with defendant to clean bus terminals does not affect determination whether the cleaners are employees of defendant for purposes of National Labor Relations Act).

Since all the home researchers were employees of DialAmerica—by application of the relevant legal test—it was DialAmerica's responsibility to ensure that the distributors paid their respective distributees the minimum wage. Indeed, when distributorships were first initiated, DialAmerica instructed the distributors on precisely the amount of money to be paid to each distributee. Although DialAmerica subsequently granted its distributors some discretion in paying distributees, DialAmerica demonstrated that it could control the rate of payment to distributees if it so desired.

VII. *ATTORNEYS' FEES*

Following the district court's grant of defendant's motion for summary judgment in this action brought by the Secretary of Labor, defendant filed with the court an application for attorneys' fees pursuant to the Equal Access to Justice Act

(EAJA), 28 U.S.C. § 2412 (1982).[15] The Act provides in relevant part that "a court may award reasonable fees and expenses of attorneys, . . . to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action." 28 U.S.C. § 2412(b) (1982). The Act provides an exception to the award of attorneys' fees if "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The district court denied defendant's application for attorneys' fees in an order and accompanying letter opinion dated March 5, 1984. Although it found defendant to be a "prevailing party" as defined by the Act, the court found that the Secretary's position was "substantially justified" under the three-part test set forth by this court in *Dougherty v. Lehman*, 711 F.2d 555 (3d Cir. 1983). DialAmerica appeals this judgment.

By our decision, DialAmerica does not prevail on the primary issue in this case, namely whether home researchers were "employees" under the FLSA. Yet, DialAmerica prevails on the less significant issue of the status of the distributors. We will therefore assume, without deciding, that DialAmerica remains a "prevailing party" for purposes of the EAJA. We will now turn to a review of the district court's determination that the position of the United States was "substantially justified."

The position of the United States includes not only its litiga-

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[15]The Act expired by its own terms effective October 1, 1984. Equal Access to Justice Act, Pub.L. No. 96-481, § 204(c). Section 204(c) states, however, that the Act "shall continue to apply through final disposition of any action commenced before the date of repeal." *Id.* Because this case was commenced before the date of repeal, the terms of the Act still apply.

tion position but also the agency position that made the lawsuit necessary. *Dougherty*, 711 F.2d at 563 n. 12; *Natural Resources Defense Council, Inc. v. EPA*, 703 F.2d 700, 708 (3d Cir. 1983).[16] Substantial justification "constitute[s] a middle ground between an automatic award of fees to a prevailing party and an award made only when the government's position was frivolous." *Dougherty*, 711 F.2d at 563. The government has the burden of proving that it was substantially justified. *Id.* at 561. To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 593 (3d Cir. 1984); *Dougherty*, 711 F.2d at 564.

The district court determined that the Secretary of Labor had satisfied its burden of proving the existence of each element in this three-part test. We agree.[17]

The district court was correct in its conclusion that there was a reasonable basis in truth for the facts alleged by the Secretary. Most of the facts in the case were not disputed by the parties, and those that were disputed were in the nature of inferences drawn from the undisputed basic facts. Moreover, we

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[16]We defer to the district court's finding that "there is complete congruence between the Department of Labor's actions at the pre-trial and trial level." *See Donovan* v. *DialAmerica Marketing, Inc.*, Civil No. 81-4020, letter op. at 2 (D.N.J. Mar. 5, 1984).

[17]Because we reach the same conclusion as the district court, we need not resolve the issue left open by this court in *Washington v. Heckler*, 756 F.2d 959, 963 n.4 (3d Cir. 1985). That decision did not determine the scope of review of the district court's "substantially justified" conclusion in a case tried in the district court as opposed to a case in which the district court performs the same function as this court in reviewing an administrative record.

concur with the court's determination that there existed a reasonable basis in law for the Secretary's position that the distributors were "employees" of DialAmerica, rather than independent contractors. In formulating its position, the Secretary relied on numerous judicial decisions which held that workers who perform their duties outside the office or factory and who are paid on a piece-rate basis are nevertheless "employees" under the FLSA. *See supra* note 11. Finally. we agree with the district court that the facts alleged by the Secretary reasonably supported the legal theory he advanced. As we observed in our analysis of the distributors' status, not all of the relevant factors support our conclusion. Analysis of the permanency-of-working-relationship factor as well as the economic-dependence consideration supports the Secretary's position that the distributors are employees rather than independent contractors. The closeness of the case, *see supra* p. ——, is also evidence of substantial justification. We therefore concur with the district court's determination that the Secretary of Labor's position in this case was substantially justified. Thus, we will affirm the court's order denying DialAmerica's application for attorneys' fees.

VIII. *CONCLUSION*

In summary, therefore, we hold that the persons who performed telephone-number research at home were "employees" of DialAmerica under the FLSA. DialAmerica was obligated to pay them the applicable minimum wage and to comply with the other provisions of the Act. Those home researchers who also distributed telephone-number research cards to other home researchers were not "employees" while they were engaged in the act of distributing. Therefore, they were not entitled to the minimum-wage protection of the FLSA for their distribution work. Finally, we hold that DialAmerica is not entitled to an award of attorneys' fees under the Equal Access to Justice Act.

Accordingly, we will affirm in part and reverse in part the judgment of the district court. We will remand so that the court may determine whether DialAmerica has satisfied the minimum-wage and record-keeping provisions of the FLSA with respect to the home researchers. If the court determines that Dial-America has not complied with the FLSA, the court may then order appropriate relief including the payment of back wages.

Letter-Opinion of the District Court

UNITED STATES DISTRICT COURT
District of New Jersey

January 26, 1984

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Re: Donovan v. DialAmerica Marketing, Inc.
Civil Action No. 81-4020

LETTER-OPINION

Counsel:

In this action, the Secretary of Labor charges that DialAmerica Marketing, Inc. willfully violated minimum wage and recordkeeping provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 (1976 & Supp. V 1981) with regard to two groups of workers connected with its home telephone research operation. At a status conference on September 22, 1982, it became clear that a critical threshold issue existed concerning whether these home workers were "employees" of DialAmerica within the meaning of the Act. The Court directed the parties to enter into a stipulation as to all of the facts of the workers' employment situation that were not in dispute, and indicated that an evidentiary hearing would be held subsequently to resolve any areas of disagreement. The

stipulation was drawn up, and on July 13 and 14, 1983, the Court heard testimony from seventeen persons in various employment relationships with DialAmerica. Following this hearing, the parties cross-moved for summary judgment, focusing on the issue of whether the home researchers were "employees" of DialAmerica. We now grant summary judgment in favor of defendant, having determined that the home workers were not "employees" within the meaning of the Act, and that the provisions of the Act upon which suit was brought are therefore inapplicable to DialAmerica.

FACTS

DialAmerica is a Delaware corporation whose principal place of business is in Teaneck, New Jersey, and which maintains offices in nineteen additional states. The business of DialAmerica is "telephone marketing", largely in the form of two major programs for the sale of magazine subscriptions, as well as other telephone marketing programs for a variety of clients. In connection with one of the sales programs—called the "expire program"—publishers supplied DialAmerica with the names and addresses of magazine subscribers whose subscriptions had, or were about to have, expired. It was DialAmerica's function to locate telephone numbers for these persons and telephone them to sell them renewal subscriptions. To obtain the necessary telephone numbers, DialAmerica utilized, as of the end of 1976, in-house workers who relied on telephone books and directory assistance operators. Toward the end of 1976, DialAmerica explored ways of increasing its telephone number research capacity, and ultimately set up a home researcher operation to accomplish this purpose. At a later point, DialAmerica developed computer capabilities to aid in its telephone number research, a technique which, by June, 1979, was locating, through match searches, the telephone numbers of approximately 50

percent of the total number requested. Since June, 1979, the in-house researchers have accounted for 20 percent of the total numbers requested. Stipulation at ¶¶8-15. Of the remaining 30 percent of the total number requested, it is unclear how many telephone numbers were actually located by the home researchers. Arthur Conway, executive vice president and treasurer of DialAmerica, testified that only 4 to 5 percent of the total number of telephone numbers sought were located by the home researchers. Transcript of July 13-14, 1983 ("Trans.") at 197.

It is further stipulated that upon deciding to begin home research as part of its "expire program", DialAmerica advertised for home researchers in the "Twin Boro News." The last advertisement ran in May, 1979, following which time potential home researchers sought out DialAmerica for work after hearing about it from friends or family members. Those responding to the advertisements or other notice were always accepted for work. These people were instructed in the method of filling out a "magazine expire card", essentially consisting of marking the correct telephone number and initialing the cards for identification, and were asked to complete an "independent contractor agreement." Stipulation at ¶¶ 17-19.

Upon signing an agreement to do home research, a worker was given an initial box of 500 cards to be returned one week later, by appointment, with as many of the correct phone numbers listed thereon as could be found. After the initial batch was returned, a home worker could request any number of cards, subject to a 500 card minimum as well as availability, to research in the next one-week period. An appointment would be set up for the return of the cards. Tracking down the telephone numbers of those named on the cards, either by telephone book or by directory assistance operators, would be done at home without any direct supervision by DialAmerica—work-

ers were completely free to choose the number of hours they would work and when those hours would be. The only instructions concerning the completion of the cards were that workers were not to look up telephone numbers for schools, libraries, Army bases, Government installations and hospitals which might appear on the cards; to keep duplicates separate; and to use a black pen. When the form of the cards changed slightly in 1982, to allow for a computer to read them, minor adjustments were made in the instructions. Workers were also told not to wear shorts when dropping off or picking up work. Stipulation at ¶¶ 23-33.

Home researchers were paid on a piece-rate basis. The original rate when the program began was 5 cents per telephone number found. This rate increased first to 7 cents and then to 10 cents per telephone number found. On special projects, DialAmerica adjusted the piece rate higher in order to compensate the home researchers for the estimated lower percentage of numbers which would be found. Payment to the home workers was made by check, with no deductions taken from the gross amount. Those researchers earning $600.00 or more for a taxable year were provided with an Internal Revenue Service Form 1099 reporting their gross compensation. Stipulation ¶ 20, 21.

A subset of the above-described home telephone researchers, numbering approximately six or seven, also acted as distributors for DialAmerica. In addition to picking up and researching their own cards, these persons also acted as intermediaries between DialAmerica and other home researchers, picking up and returning cards for the latter. The distributors instructed their distributees as to the method of filling out the cards. DialAmerica paid these distributors one cent above the current piece rate for the gross amount of all numbers found by them and the per-

sons to whom they distributed cards.[1] The distributors were paid in one check, and they in turn paid those to whom they distributed either by check or in cash. Stipulation at ¶¶ 19, 22, 31.

On June 1, 1982, the home telephone research operation was discontinued. Stipulation at ¶15. The complaint in this action was filed on December 30, 1981, alleging that DialAmerica was willfully compensating the home telephone researchers at a subminimum wage rate, in violation of 29 U.S.C. §§ 206, 215 (a)(2), and that DialAmerica had willfully failed to keep adequate records of its employees' wages, hours and other conditions of employment, in violation of 29 U.S.C. §§ 211, 215(a)(5).

DISCUSSION

The Fair Labor Standards Act's minimum wage and record-keeping requirements regulate commercial conduct only in an employer-employee relationship; the Secretary of Labor concedes that if the home workers in this action are not "employees" of DialAmerica, the latter is free of any wrongdoing. *See, e.g.*, Br. in Support of Pl.'s Motion for Summary Judgment at 2-3. The question that must be resolved on these cross-motions for summary judgment, therefore, is whether an employer-employee relationship existed between DialAmerica and its home researchers. We conclude that it did not.

The Act itself provides no guidance of a definitional nature: "Employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee", 29 U.S.C. § 203(d); an "employee" refers to "any individual employed by an employer", §203(e)(1); and "em-

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[1]This stipulated fact is somewhat at odds with the actual testimony of the distributors given at the July, 1981 evidentiary hearing, *see infra* at 8, and we will credit the latter version.

ploy" includes "to suffer or permit to work", 29 U.S.C. §203 (g). Escape from tautology is found in the Supreme Court trilogy of the 1940's involving the meaning of "employee" under the National Labor Relations Act, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Social Security Act, *United States* v. *Silk*, 331 U.S. 704 (1947), and the Fair Labor Standards Act, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). In *Rutherford Food*, 331 U.S. at 723-24, the Court found "persuasive" in the FLSA context a "factor" analysis the Court had utilized in *Silk* with regard to the Social Security Act. The *Silk* "employee" analysis considered the degrees of control exercised over the alleged employee, the employee's opportunity for profit or loss, the employee's investment in the facility, the permanency of the relationship with the employer, and the skill required of the job in question. *Silk*, 331 U.S. at 716. The Court noted that no one of these factors is necessarily controlling, nor is the list necessarily complete. *Id.* As emphasized in *Rutherford Food*, determination of the employer-employee relationship depends "upon the circumstances of the whole activity." 331 U.S. at 730; *accord Bartels* v. *Birmingham*, 332 U.S. 126 (1947) ("the total situation" controls determination of whether under social legislation workers are "employees"). The same inquiry obtains with respect to home workers. *See Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961); *accord Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464 (9th Cir. 1973).

This circuit has recently noted that, subsequent to *Rutherford Food* and *Silk*, courts have applied an "economic realities" standard in determining whether a worker is an employee under the FLSA. *EEOC v. Zippo Manufacturing Co.*, 713 F.2d 32, 36 (3d Cir. 1983) (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981); *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976)). Under this formulation, the court determines the degree to

which a worker is economically dependent on the business with which he is connected, based upon the factors identified in *Silk*, *Bartels*, and elsewhere. *Id.* at 36-37. Regardless of the labels attached to the analysis, however, courts have consistently recognized that the "employee" evaluation must look to the totality of economic circumstances. *See Goldberg*, 366 U.S. at 33 ("economic reality" rather than "technical concepts" to be the test of employment under FLSA).

In the problem before us, we will consider separately workers who performed home telephone research and those who also acted as distributors. Although the parties felt it necessary to call ten home researchers[2] and five distributors, the testimony of all workers was remarkably similar. Indeed, it quickly became clear to the Court that the parties' disagreement centered not on the description of the workers' functions, but on the characterization thereof.

The definitive feature of the home telephone researcher position was the freedom it provided to the workers who located telephone numbers at home. While many of the home researchers held their position for a number of years, each testified that one was nearly without rule or regulation regarding the performance of the job. Ms. Hahn, who had worked both as a home researcher and an in-house "look-up", testified that, while as an in-house employee she had an actual obligation to work every

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[2]One of these researchers, Ms. Davis, was in a slightly different category than the other nine. Ms. Davis testified that she was a "subcontractor", as denominated by DialAmerica, in that she was provided with cards to research by a distributor rather than by DialAmerica directly. In all other respects, her position was identical to the nine home researchers who testified in Court. Trans. at 145-46. Thus, while her relationship to DialAmerica was one step removed as compared to the other home researchers, our analysis with respect to the latter category of workers is equally applicable to Ms. Davis and any other "distributee."

day, as a home researcher she had felt she was under no actual obligation to do work on any given day unless she so chose. Trans. at 19-20, 28. Ms. Antonacci stated that DialAmerica did not prescribe the manner of her performance, except to instruct that telephone books and directory assistance were the available sources, and she indicated that she was under no requirements as to minimum hours. Trans. at 37-38. Ms. Nugent told the Court that she received help from her husband, and emphasized that she could work whatever hours she chose, and that she could stop working altogether and then resume working at a later point. Trans. at 46, 48-49. Replicate testimony was heard from Ms. Sticco, who responded to the following questions:

> MR. PORET: And you were free to do the work in the manner that you chose?
> MS. STICCO: Yes.
> MR. PORET: And you were free to do the work in the hours of the day that you chose?
> MS. STICCO: Yes.
> MR. PORET: And you were free to stop working for periods of time as you chose?
> MS. STICCO: Yes.

Trans. at 90. Ms. Lagala answered the Court's questions similarly regarding the control DialAmerica exercised over her:

> THE COURT: You decided how many cards you would attempt to do each week?
> MS. LAGALA: Right.
> THE COURT: You decided whether you would work that week or not work that week, true?
> MS. LAGALA: True.
> THE COURT: I gather, if your testimony is like the other people's testimony, you didn't feel as though if

you didn't work one week you wouldn't be allowed to work next week. In other words, up to you whether you worked or didn't work.

MS. LAGALA: Right.

Trans. at 153. The relationship that the home researcher had with DialAmerica was best summed up in Mr. Rea's answer to the question whether he worked practically every work week: "I worked when I wanted to work. . . . I could have went away for three days and come back again and worked. I work for myself. . . ." Trans. at 171-172.

In short, the home researcher program was designed to allow the individual to work at her or his own rate, under whatever conditions were deemed desirable, for as long as she or he wanted, without any supervision at all. Unquestionably certain minimal oversight existed, such as checks by DialAmerica to make sure the cards were being filled out properly, or the rough one-week time allocation for returning cards (the number of which were taken each week being up to the individual home researcher), or the fact that women were not allowed to wear shorts when returning the cards to DialAmerica's offices; but we find these slight interactions to be simply a necessary attendant to any business situation. They are by no means indicative of the degree of control which we feel must be reached before such a situation may be classified as one between an "employer" and an "employee." When compared to the type of direct and constant supervision given the in-house "look-ups"—regular hours, regular weeks, card quotas, scheduled work breaks, *see* Testimony of Ms. Rea, Manager of DialAmerica's Lead Processing Department, Trans. at 184-86, 193—the restrictions on the home researchers appear inconsequential.

We recognize that in this case not every "factor" in the *Rutherford Food/Silk* analysis, when viewed in isolation, weighs

against a finding that the home researchers were "employees" within the meaning of the FLSA. It cannot be denied that, for the most part, the investment of these workers was not great, the opportunity for profit or loss was small, and the skills required were few. Yet of greater significance under the "economic realities" standard summarized in *Zippo Manufacturing, see supra* at 4-5, is the fact that the home researchers explicitly stated that the money they earned from DialAmerica was not the primary family income, but merely a secondary source, *see* Trans. at 25, 38, 40, 82—in the words of one home researcher, the earnings were "pocket money." Trans. at 146. The totality of circumstances surrounding the employment situation of these home workers indicates that they operated under the barest possible structure, working under their own demands in terms of method and magnitude, supplementing their family's income when it was convenient. In the words of one home researcher, who testified that she worked roughly every other week "according to what was happening in the house", the job was one where "[y]ou could be your own boss. . . . It [was] your own system and how you worked." Trans. at 175-76, 178. We find that the home telephone researchers were not "employees" under the Act.[3]

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[3]As part of both sides' presentation at the hearing, a good deal of testimony was brought forth concerning the way in which the home researchers and distributors reported income and deductions on their tax returns in connection with their employment at DialAmerica. In our determination as to these workers' "employee" status, we have not considered this information since at best it reflects an attempt either by DialAmerica or the various workers to name their own legal category. Yet, "[i]t is clear beyond peradventure that the parties' attempt to fasten a name of 'independent contractor' or 'employment' to their relationship by their own agreement—or, worse, where one party imposes a name on the other—will avail them little in ascertaining what the relationship is for purposes of the F.L.S.A. or similar legislation." *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 302 (9th Cir.

(Footnote continued on following page)

In addition to those who worked as home telephone researchers, the Court heard testimony from five persons who worked as distributors for DialAmerica. Our conclusion that these workers were not "employees" is arrived at more quickly.

It was the uniform testimony of the distributors that their job consisted of picking up cards for other home researchers (denominated by DialAmerica as "subcontractors", whom we will refer to as "distributees") and subsequently collecting the completed cards and returning them to DialAmerica. While DialAmerica initially had a record of who the individual distributees were, through a signed "subcontractor agreement", eventually the company stopped keeping track of these individuals and relied entirely on the distributors to keep records. *See, e.g.*, Trans. at 134-35. Moreover, while DialAmerica at first set the piece-rate for the distributees' work, at a later point the distributors had full control over the rate at which their distributees would be paid. Trans. at 133, 142. The distributors testified that DialAmerica never checked to see if the distributees were actually paid from the lump sum check issued to the distributors. Trans. at 74, 103. Although some distributors stated that DialAmerica recommended that they keep their own records, this was not a requirement, and DialAmerica did not regularly check these records. Trans. at 81, 121, 130-31, 144.

It is evident to the Court that these distributors were small businesspersons, who controlled their own fleet of distributees subject only to the scantiest oversight by DialAmerica. They

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(Footnote continued from previous page)

1975) (citing *Bartels*). Our decision as to the legal relationship between DialAmerica and the workers involved in this action must be based on the complete circumstances of that relationship, rather than on the parties' own efforts to categorize themselves. *See also, Zippo Manufacturing*, 713 F.2d at 35-36 (definition of "employee" under FLSA may not be coextensive with definition under Internal Revenue Code).

recruited the distributees, in one case even through advertisement under the distributor's name, Trans. at 141-42; they established the rate of compensation for the distributees; they kept their own records regarding their workers; and they were subject to little or no supervision by DialAmerica concerning their functions as distributors. The distributors shouldered all of their own expenses in equipping their distributees, which for some was quite costly. *See, e.g.*, Trans. at 62 (Ms. Herdman, who lived in New Jersey, distributed cards to women living on Long Island); Trans. at 142 (Mr. Selvaggio based a distributee's piece rate on his own travel time in distributing to her). To an even greater extent than the home researchers, the success of the distributors' venture was determined by their own effort, initiative, and management. In their capacity as distributors, these persons acted as independent contractors for DialAmerica, providing the latter with a way of increasing its home research operation while insulating itself from direct contact with the added work force. We conclude that the distributors were in business for themselves, and that DialAmerica was consequently under no obligation to compensate or to keep records in accord with the FLSA with respect to these workers.[4]

Recognizing the broad purposes of the FLSA, we nonetheless cannot conclude that the home researchers and distributors were "employees" of DialAmerica. Accordingly, summary judgment will be entered in favor of defendant.

Very truly yours,

HERBERT J. STERN
United States District Judge

Orig. to Clerk, U.S. District Court
Newark, New Jersey

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[4]As indicated earlier, testimony was offered concerning the distributors' tax returns, but this information has not influenced today's decision. *See supra* at 7, n.3.

Order of the District Court

UNITED STATES DISTRICT COURT
District of New Jersey

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Plaintiff,

—*against*—

DIALAMERICA MARKETING, INC.

Defendant.

Civil Action No. 81-4020

O R D E R

For the reasons set forth in this Court's letter-opinion filed herewith,

It is on this 26 day of January, 1984,

ORDERED that plaintiff's motion for summary judgment be, and it hereby is, denied; and it is further

ORDERED that defendant's motion for summary judgment be, and it hereby is, granted.

HERBERT J. STERN
United States District Judge

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5217 & 5245

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,

Appellant,

—against—

DIALAMERICA MARKETING, INC.,

Appellee.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges,* and VAN DUSEN, *Senior Circuit Judge**

The petition for rehearing filed by Appellee

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Edward R. Becker
Judge

Dated: April 9, 1985

*As to panel rehearing only.

Order Amending Opinion

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5217 & 84-5245

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,

Appellant in No. 84-5217
Appellee in No. 84-5245

—against—

DIALAMERICA MARKETING, INC.,

Appellant in No. 84-5245
Appellee in No. 84-5217

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
(D. C. Civil No. 81-4020)

Argued October 18, 1984

Before: GIBBONS, BECKER, *Circuit Judges.*
and VAN DUSEN, *Senior Circuit Judge*

(Filed March 13, 1985)

ORDER AMENDING OPINION

It is hereby ordered that the panel opinion filed March 13, 1985, is hereby amended to substitute for the word "any" on line 12 of page 16 of the slip opinion the words "more than three

among dozens of" so that the sentence commencing on line 12 will read:

> "Moreover, there was no evidence to show that more than three among dozens of home researchers performed similar services for another organization while he or she was working for the defendant.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: April 18, 1985

A True Copy:

Teste:

Clerk of the United States of Apepals
for the Third Circuit

Supreme Court, U.S.
FILED
OCT - 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-2018

In the Supreme Court of the United States

OCTOBER TERM, 1985

DIALAMERICA MARKETING, INC., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether individuals who worked at home to locate telephone numbers for a telephone marketing firm were "employees" of the firm within the meaning of Section 3(e)(1) of the Fair Labor Standards Act, 29 U.S.C. 203(e)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-2018

DIALAMERICA MARKETING, INC., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 757 F.2d 1376. The opinion of the district court (Pet. App. 27a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1985, and a petition for rehearing was denied on April 9, 1985 (Pet. App. 40a). The petition for a writ of certiorari was filed on June 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The issue in this case is whether petitioner's "home researchers" were employees within the meaning of Section 3(e)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(e)(1).

1. Petitioner, DialAmerica Marketing, Inc. (DialAmerica), is a telephone marketing firm that conducts operations in 20 states and maintains its principal place of business in Teaneck, New Jersey (Pet. App. 3a). A major portion of petitioner's business involves selling magazine renewal subscriptions to subscribers designated by magazine publishing companies (Pet. App. 3a, 28a; see Pet. 4). Petitioner prepares a card indicating the subscriber's name and address, locates the subscriber's telephone number and inserts it on the card, and forwards the card to one of its branch sales offices (Pet. App. 3a; see Pet. 4).

From 1976 to June 1982, petitioner relied on both in-house employees and homeworkers, known as "home researchers," to locate subscribers' telephone numbers (Pet. App. 3a).[1] Petitioner paid its in-house employees a minimum hourly wage, but paid the home researchers a piece rate unilaterally determined by petitioner. In 1976, petitioner set the rate at five cents per telephone number found. Petitioner increased the rate to seven cents, and then to ten cents, before it discontinued the home research program in 1982 (*id.* at 5a-6a, 30a). On some projects, petitioner set a higher piece rate to compensate the home researchers for the estimated lower percentage of correct numbers they were likely to find (*ibid.*).

Petitioner never rejected any applicant for home-research work, although it did subsequently discharge some home researchers for substandard work (Pet. App. 4a). Applicants received instructions for completing the magazine

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[1]Beginning in June 1979, petitioner also relied on a computer program for telephone-number research (Pet. App. 4a). After June 1979, about 50% of the telephone numbers sought by petitioner were located through the computer program (*ibid.*). Another 20% of the numbers were located by in-house employees through the use of telephone books and directory-assistance operators (*id.* at 4a, 29a). Home researchers located approximately 5% of the numbers sought (*ibid.*).

expire cards, and signed "Independent Contractor's Agreements" (*ibid.*). Petitioner initially gave each home researcher a box of 500 cards to complete and return to petitioner's Teaneck office within one week (*ibid.*). Thereafter, each researcher was free to choose the number of cards for completion in any given week, subject to a 500-card minimum and occasional limited availability of cards (*id.* at 5a).

Petitioner required the home researchers to write the telephone numbers in black ink or by porous tip pen, to place their initials and the letter "H" on each completed card, and to segregate duplicate cards (Pet. App. 5a). Petitioner instructed the researchers not to look for the telephone numbers of schools, libraries, government installations or hospitals (*ibid.*). It also instructed the researchers to set up an appointment to return each batch of cards at petitioner's Teaneck office one week after receipt and to wear appropriate attire when they came to the office to pick up or deliver cards (*id.* at 5a, 30a).

Petitioner did not designate the days, hours, or weeks that the home researchers worked (Pet. App. 5a, 29a-30a). Nor did it require the home researchers to keep records of the hours that they worked (*id.* at 5a). Rather, petitioner left the home researchers free to choose their own work schedules, subject only to the general requirement that cards be returned within one week of receipt (*id.* at 4a-5a, 29a-30a). The great majority of the home researchers worked continuously and exclusively for petitioner, and many did so for several years (*id.* at 15a, 33a).

2. The Secretary of Labor commenced this action in the United States District Court for the District of New Jersey to enjoin petitioner from violating the minimum wage and record-keeping provisions of the FLSA, and to compel petitioner to pay past wages owed under the FLSA. On

January 26, 1984, the district court entered summary judgment for petitioner (Pet. App. 27a, 38a). The court relied on petitioner's lack of supervision over either the hours of the home researchers or their work at home to conclude that petitioner did not exercise "the degree of control which we feel must be reached before such a situation may be classified as one between an 'employer' and an 'employee' " (*id.* at 35a).

The district court did find that the investment of the home researchers "was not great, the opportunity for profit or loss was small, and the skills required were few" (Pet. App. 36a), all factors supporting treatment of the home researchers as employees. But it noted that the researchers' earnings were typically secondary sources of family income and concluded that the researchers were not dependent on petitioner as a matter of economic reality (*ibid.*). Consequently, the district court concluded that the home researchers were not "employees" under the FLSA (*ibid.*). It also concluded that home researchers who also acted as "distributors," distributing work to other home researchers, were not "employees" for purposes of the FLSA (*id.* at 37a).

The court of appeals affirmed in part and reversed in part, concluding that home researchers other than distributors were employees for purposes of the FLSA, but distributors were not (Pet. App. 1a, 25a-26a). The court held that the totality of the circumstances must be considered in determining whether a worker is an employee (*id.* at 9a). It adopted the six-factor test announced in *Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1370 (9th Cir. 1981), as an appropriate legal standard for determining whether home researchers were employees.[2]

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[2]*Sureway Cleaners* requires consideration of: "1) * * * the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss

The court of appeals expressly considered all six factors. It first noted that even the district court agreed that three factors—the home researchers' limited investment, skill, and opportunity for profit or loss—unequivocally supported a conclusion that the home researchers were employees (Pet. App. 11a-12a). The court of appeals acknowledged that petitioner did not exercise complete supervisory control over the home researchers, but remarked that this factor cannot be given controlling weight in the "homeworker" situation (*id.* at 12a-15a). The court of appeals observed that home researchers generally had a permanent relationship with petitioner and were an integral part of petitioner's business in the sense that they performed petitioner's primary type of work and did not perform that type of work for others (*id.* at 15a-16a). Thus, the court of appeals concluded that full consideration of the relevant factors supported a conclusion that the home researchers were "employees" for purposes of the FLSA (*id.* at 17a-18a). The court remanded the case for consideration of whether petitioner had satisfied the minimum wage and record-keeping requirements of the FLSA (*id.* at 26a).

ARGUMENT

The court of appeals applied well-settled legal principles to the particular facts of this case. Its interlocutory decision does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is unwarranted.

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depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business." 656 F.2d at 1370. These factors are considered to determine "whether, as a matter of economic reality, the individuals 'are dependent upon the business to which they render service.' " *Ibid.*, quoting *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947).

1. Petitioner argues that the court of appeals "misconstrued the test established by this Court for determining the status of workers under the FLSA" and "imposed, in effect, a *per se* rule that homeworkers are always statutory 'employees' "(Pet. 11). These statements plainly mischaracterize the court of appeals' decision. The court, following the uniform practices of this Court and other courts of appeals, examined "the circumstances of the whole activity," *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 730 (1947), to determine the economic realities of the workers' labor. See *Tony & Susan Alamo Foundation* v. *Secretary of Labor,* No. 83-1935 (Apr. 23, 1985), slip op. 3, 10; *Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 U.S. 28, 33 (1961).[3] The court specifically eschewed per se rules and carefully considered all of the relevant factors through the six-part test specified in *Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1370 (9th Cir. 1981). See Pet. App. 11a-17a.[4] Indeed, the court's conclusion that homeworker distributors were not employees obviously disproves petitioner's assertion that the court imposed a "*per se* rule that homeworkers are always statutory 'employees.' "

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[3]See also, *e.g., Donovan* v. *Brandel,* 736 F.2d 1114, 1116 (6th Cir. 1984); *Donovan* v. *Williams Oil Co.,* 717 F.2d 503, 505 (10th Cir. 1983); *Donovan* v. *New Floridian Hotel, Inc.,* 676 F.2d 468, 470 (11th Cir. 1982); *Donovan* v. *Sureway Cleaners,* 656 F.2d at 1370; *Usery* v. *Pilgrim Equipment Co.,* 527 F.2d 1308, 1311-1312 (5th Cir.), cert. denied, 429 U.S. 826 (1976).

[4]The *Sureway Cleaners* factors, like the factors applied by other courts of appeals, are a summation of what this Court has deemed relevant in analyzing the economic realities of an employment relationship under the FLSA. 656 F.2d at 1370 & n.5. See *Bartels* v. *Birmingham,* 332 U.S. 126, 130 (1947); *Rutherford Food Corp.* v. *McComb, supra*; *United States* v. *Silk,* 331 U.S. 704, 716 (1947). *Bartels* and *Silk* involved the Social Security Act, rather than the FLSA, but are recognized as leading precedent on the FLSA "employment" relationship. See, *e.g., Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 U.S. at 33.

Petitioner mistakenly contends that the court of appeals failed to give adequate consideration to the scope of petitioner's control over its home researchers, charging that the court's analysis "all but eliminates the control test as a factor in determining employee status" (Pet. 17). The court fully considered the control factor, noting that it "weighs in favor of the conclusion that the home researchers were not employees" (Pet. App. 17a). The court simply refused to give it "dispositive" weight (*id.* at 13a). That approach is plainly correct. See, *e.g., Bartels* v. *Birmingham,* 332 U.S. 126, 130 (1947) (employee status is "not to be determined solely by the idea of control").

The court of appeals correctly discerned the obvious similarities between this case and other cases recognizing homeworkers as "employees" for purposes of the FLSA (Pet. App. 13a-14a). Petitioner's home researchers were "not self-employed; nor [were] they independent, selling their products on the market for whatever price they [could] command." *Goldberg*, 366 U.S. at 32-33. They were "regimented under one organization," providing services that "the organization desire[d] and receiving the compensation the organization dictate[d]." *Id.* at 32 (footnote omitted). In these circumstances, the court of appeals correctly held that petitioner's diminished control and supervision over the home researchers could not conclusively determine their employment status. See, *e.g., McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F.2d 633, 637 (4th Cir.), cert. denied, 338 U.S. 900 (1949); *Walling* v. *American Needlecrafts, Inc.,* 139 F.2d 60, 62-63 (6th Cir. 1943).

Petitioner additionally objects to the court of appeals' determination that the home researchers' services were an integral part of its business (Pet. 20-26). The court rightly based that determination on the fact that home researchers performed a type of service that was central to petitioner's business operations. See *Sureway Cleaners,* 656 F.2d at

1372 (" 'Agents' do the same work as those individuals explicitly hired as employees * * *. Thus, the 'agents' are an essential part of [the] operation."); see also *Hodgson* v. *Ellis Transportation Co.*, 456 F.2d 937, 940 (9th Cir. 1972). The integral relationship factor looks to whether a service is so closely related to a firm's basic business that the worker who performs it cannot be an independent contractor. Petitioner is thus mistaken in asserting (Pet. 21-22) that the home researchers' services should be considered "non-integral" simply because their efforts contributed only a limited percentage to petitioner's total business volume.

Petitioner's objections to the court of appeals' assessment of the home researchers' "economic dependence" (Pet. 17-20) are likewise insubstantial. Contrary to petitioner's suggestion (*id.* at 17), "economic dependence" is not a specific factor that is weighed in determining employment; rather, it is an ultimate conclusion whether an employment relationship exists. The concept of "economic dependence" reflects a distinction between workers who function, in effect, as *independent* contractors and those who are, in economic reality, *dependent* employees. See, *e.g.*, *Bartels* v. *Birmingham*, 332 U.S. at 130-132; *Usery* v. *Pilgrim Equipment Co.*, 527 F.2d 1308, 1311 (5th Cir.), cert. denied, 429 U.S. 826 (1976).

Thus, the court of appeals properly noted that economic dependence turns upon whether the workers are "dependent on a particular business or organization for their continued employment" and not whether the workers "depend on the money they earn for obtaining the necessities of life, as the district court suggest[ed]" (Pet. App. 16a). Contrary to petitioner's assertions (Pet. 18-19), the Sixth Circuit's decision in *Donovan* v. *Brandel*, 736 F.2d 1114 (1984), is consistent with that approach. *Brandel* found that migrant farmer workers, who "could perform similar work at other farms" were not "economically dependent upon Brandel's

business." *Id.* at 1120. The migrant farm workers therefore functioned, in effect, as independent contractors.

2. Accordingly, the court of appeals' decision is consistent with the decisions of other courts that have cited similar factors in finding that homeworkers are "employees" under the FLSA. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. at 32-33; *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F.2d at 636-637; *Walling* v. *Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir.), cert. denied, 331 U.S. 851 (1947); *Walling* v. *American Needlecrafts, Inc.*, 139 F.2d at 62-63.[5] The decision turns on the particular, case-specific relationship between petitioner and the home researchers;

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[5]Petitioner's arguments to the contrary (Pet. 16-17, 24) lack merit. For example, the district court decisions that petitioner cites found homeworkers to be employees under the totality of the circumstances notwithstanding the supplemental nature of their earnings, *Silent Woman, Ltd.* v. *Donovan*, 585 F. Supp. 447, 451-452 (E.D. Wis. 1984); *Wirtz* v. *Wrightenberry*, 218 F. Supp. 404, 406-407 (M.D.N.C. 1963), or the absence of direct control over hours and work performance, *Hodgson* v. *Rancourt*, 336 F. Supp. 1119, 1121-1122 (D. R.I. 1972); *Mitchell* v. *Nutter*, 161 F. Supp. 799, 801 (D. Me. 1958); *Walling* v. *Freidlin*, 66 F. Supp. 710, 711-712 (M.D. Pa. 1946). They did so because other relevant aspects of the work relationship indicated employment status as a matter of economic reality. None of the other cases petitioner cites (Pet. 15, 23) casts doubt upon the court of appeals' decision. Two of those cases, *Brennan* v. *Sand Products, Inc.*, 371 F. Supp. 236 (W.D. Okla. 1973), and *Wirtz* v. *Manchester Sand, Gravel & Cement Co.*, 236 F. Supp. 885 (D.N.H. 1964), involved truck drivers who, unlike the homeworkers, had made capital investments and had opportunities for profit or loss that depended on skill, judgment and initiative, rather than mere efficiency. Another case, *Wirtz* v. *San Francisco & Oakland Helicopter Airlines, Inc.*, 244 F. Supp. 680 (N.D. Cal. 1965), aff'd, 370 F.2d 328 (9th Cir. 1966), involved individuals who worked on an airlines' premises with no expectation of compensation from the airlines. The remaining cases, *Atkins* v. *General Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983), and *Donovan* v. *American Airlines, Inc.*, 514 F. Supp. 526 (N.D. Tex. 1981), aff'd, 686 F.2d 267 (5th Cir. 1982), involved trainees, not homeworkers, and clearly are inapposite.

thus, it does not present questions of general importance warranting this Court's review. Indeed, petitioner has discontinued its home researcher program (Pet. 11) and only questions of past liability remain.

Even if petitioner raised a question of sufficient importance to warrant this Court's attention, review would be inappropriate at this time. The court of appeals' decision, remanding the case to the district court for determination of petitioner's compliance with the minimum wage and record-keeping requirements of the FLSA, is interlocutory. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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